No. 85-1197

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

THE HONORABLE HARRY EUGENE CLAIBORNE,
UNITED STATES DISTRICT JUDGE,
Petitioner,

v.

UNITED STATES OF AMERICA
Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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UNITED STATES of America
Plaintiff-Appellee,

v.

Harry E. CLAIBORNE,
Defendant-Appellant.

No. 84-1294

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted March 26, 1985.
Decided July 8, 1985

Appeal from the United States District Court for the District of Nevada.

Before PELL, LUMBARD, and McWILLIAMS Senior Circuit Judges.*

PELL, Senior Circuit Judge

A jury sitting in Reno, Nevada, convicted Defendant Harry E. Claiborne on two counts charging that defendant will-

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*Wilbur F. Pell, Jr., Senior Circuit Judge for the Seventh Circuit. J. Edward Lumbard, Senior Circuit Judge for the Second Circuit, and Robert H. McWilliams, Senior Circuit Judge for the Tenth Circuit, sitting by designation.

fully underreported his taxable income on his 1979 and 1980 tax returns. 26 U.S.C. § 7206(1)(1967). The jury acquitted defendant of one count charging that he submitted a false statement to the Judicial Ethics Committee. 18 U.S.C. § 1001 (1976). The district court sentenced defendant to a term of two years imprisonment plus a $5,000 fine on each tax count. Defendant appeals from the judgment of conviction on the two income tax counts.

I. THE FACTS

Defendant, who continues to hold office as a United States district judge, became a district judge for the District of Nevada on September 1, 1978. Prior to that time, defendant was engaged in a lucrative private practice in Las Vegas, Nevada, and had had an income of six figures annually. Upon entering the

judiciary, defendant's annual salary was $58,000. In a 1980 letter requesting payment of legal fees he had earned before becoming a judge, defendant stated that he was in desperate financial straits. Approximately two years later, a federal grand jury in Portland, Oregon, began investigating allegations that defendant had accepted bribes from a Joseph Conforte in the performance of his official duties. Two subsequent grand juries, one again in Portland, Oregon, and one in Reno, Nevada, investigated these charges as well as allegations that defendant had understated his income in his 1979 and 1980 tax returns and had filed a false financial statement with the Judicial Ethics Committee. The term of the first Portland grand jury expired and the second grand jury there was not asked to return an indictment. The Reno grand jury, however,

returned a seven count indictment against defendant, containing four charges relating to defendant's alleged bribery activities with Joseph Conforte, the two tax counts, and one count charging that defendant falsely reported his finances to the Judicial Ethics Committee.

Joseph Conforte appeared as a witness before the indicting grand jury. In exchange for Conforte's testimony, and his agreement to cooperate fully in further investigations of defendant and in his prosecution, the Government agreed to recommend a substantial reduction in sentences that Conforte had previously received for tax evasion. Subsequently, a federal judge ordered reduction of Conforte's sentences.

Defendant moved to dismiss the indictment returned against him on various grounds, all of which the district court

rejected. The case then proceeded to trial. The district court ultimately declared a mistrial after the jury reported that it was hopelessly deadlocked.

At this point, the Government voluntarily moved to dismiss the four Conforte bribery counts, stating in part: "The attorneys further believe that in the first trial of this case the presentation of evidence on Counts One, Two, Three and Four may have distracted the jury in its consideration of Counts Five, Six, and Seven and contributed to its inability to reach a verdict on those counts." Record at 204. Defendant then renewed all previous pretrial motions relating to the remaining three counts, all of which the district court denied, in some instances after a hearing. The case subsequently proceeded to trial for a second time, on the two tax counts and the count relating

to the Judicial Ehtics Committee. As we have noted, the jury convicted defendant on the two tax counts, but acquitted him on the count relating to the Ethics Committee.[1]

Defendant challenges his conviction on a number of grounds, which we shall discuss in turn.

II. DEFENDANT'S CONTENTIONS

A. Judicial Immunity from Prosecution

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1. The defendant points out in his brief that the jury acquitted him on Count VII. The Judicial Ethics Committee count, but convicted him on the two tax counts, which likewise involved the reporting of income. The defendant does not directly challenge these verdicts as being inconsistent. To the extent he indirectly does so, we do not regard them as inconsistent. Count VII related to a requirement that federal judges disclose certain information about their property and income in an annual report. The jury may well have regarded violation of this requirement as an entirely different crime from filing false information in an income tax return, because the latter involves a failure to pay money due the Government and acutely concerns the public interest.

Defendant's first contention deserves minimal attention from this court. Defendant contends that Articles I and III of the United States Constitution, as well as the doctrine of separation of powers, prohibit the prosecution of a federal judge without prior impeachment by Congress. The parties concede that no impeachment proceedings have been brought against defendant. Defendant filed a pretrial motion covering these contentions, which the district court denied. This Court upheld the district court's denial of defendant's motion. United States v. Claiborne, 727 F.2d 842 (9th Cir. 1984), cert. denied, U.S. , 105 S.Ct. 113, 83 L.Ed.2d 56.

In upholding the denial of defendant's motion, this court relied on two cases which dismissed similar claims. United States v. Claiborne, 727 F.2d at

845, citing United States v. Hastings, 681 F.2d 706 (11th Cir. 1982), cert. denied, 459 U.S. 1203, 103 S.Ct. 1188, 75 L.Ed.2d 434 (1983); United States v. Isaacs, 493 F.2d 1124 (7th Cir. 1974)(per curiam), cert. denied, 417 U.S. 976, 94 S.Ct. 3184, 41 L.Ed.2d 1146. These cases squarely held that the Constitution does not immunize a federal judge from criminal prosecution prior to impeachment. United States v. Hastings, 681 F.2d at 710-11; United States v. Isaacs, 493 F.2d at 1144. In view of the reasoning in Hastings and Isaacs, and in view of our previous opinion, in this case, squarely deciding this issue adversely to defendant, we see no reason to re-examine the question here.

We remark, in addition, that defendant's suggestion that the protections guaranteed by the Constitution to criminal

defendants are inadequate to protect a federal district judge appears disingenuous from our review of the record, which appears to us to reflect that defendant was afforded a fair trial fully consistent with the protection of his constitutional rights.

B. Intrusions into the Grand Jury's Independence

Defendant's second contention, in which he seeks dismissal of his indictment, subsumes numerous challenges relating to the manner in which the prosecution obtained the indictment. These challenges, unlike defendant's first contention, merit some discussion from this court.

1. The Conforte testimony and its effect on the grand jury

Defendant contends that the prosecution knowingly presented the perjurious testimony of Joseph Conforte to the

indicting grand jury, and that this testimony unconstitutionally biased the grand jury against him. Defendant maintains that the prosecution intentionally failed, in examining Conforte, to require Conforte to specify the exact dates on which incidents culminating in the alleged acts of bribery occurred, because the prosecution allegedly knew that the acts did not take place. Defendant additionally maintains that the prosecution amended its request for notice of defendant's intent to rely on an alibi defense three times before trial, each time changing the dates on which the alleged acts of bribery took place, because Conforte kept changing the details of his story. These acts, defendant asserts, amounted to the knowing presentation of perjured testimony, or at least an invitation to Conforte to perjure himself before

the grand jury. Defendant asserts that Conforte's perjurious testimony irreparably biased the grand jury against him, in violation of the Due Process Clause of the Fifth Amendment. Alternatively, defendant asserts that the prosecution's behavior in obtaining and presenting the Conforte testimony justifies a dismissal of defendant's indictment in the exercise of this court's supervisory power.

We begin our analysis by examining the Fifth Amendment's grand jury guarantee in federal felony trials. That guarantee ensures that, except in certain military cases, "[n]o person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand jury." U.S. CONST. amend. V. Federal courts agree that the framers of the Bill of Rights included the grand jury guarantee in the Fifth Amendment

to protect wrongfully accused defendants against mistaken and vindictive prosecutions. See United States v. Dionisio, 410 U.S. 1, 16-17, 93 S.Ct. 764, 772-773, 35 L.Ed.2d 67 (1973); Y. KAMISAR, W. LAFAVE & J. ISRAEL, MODERN CRIMINAL PROCEDURE (1980). Federal courts also agree, however, that the grand jury serves important investigative functions in addition to serving as a shield against unwarranted prosecution. United States v. Calandra, 414 U.S. 338, 343, 94 S.Ct. 613, 617, 38 L.Ed.2d 561 (1974). As the Supreme Court observed in Branzburg v. Hayes, 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972)(citations omitted):

> It is a grand inquest, a body of powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular indivi-

> dual will be found properly subject to an accusation of crime. . . .

Id. at 688, 92 S.Ct. at 2660.

> When the grand jury is performing its investigatory function into a general problem area . . . society's interest is best served by a thorough and extensive investigation. A grand jury investigation is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed. Such an investigation may be triggered by tips, rumors, evidence proffered by the prosecutor, or the personal knowledge of the grand jurors. It is only after the grand jury has examined the evidence that a determination of whether the procedures will result in an indictment can be made.

Id. at 701-02, 92 S.Ct. at 2667 (citations omitted).

In view of the grand jury's broad investigatory powers, and in view of the grand jury's duty not to determine guilt or innocence but to determine whether

probable cause exists to believe that a crime has been committed, United States v. Calandra, 414 U.S. at 349, 94 S.Ct. at 620, the courts have sharply limited a defendant's ability to challenge the nature of evidence presented to a grand jury. See Calandra, 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974) (holding that a grand jury witness may not refuse to answer questions on the ground that the questions were based on evidence derived from an unlawful search and seizure); Costello v. United States, 350 U.S. 359, 76 S.Ct. 406, 100 L.Ed. 397 (1956)(barring a challenge based on the exclusive use of hearsay before a grand jury); Lawn v. United States, 355 U.S. 339, 78 S.Ct. 311, 2 L.Ed.2d 321 (1958) (prohibiting a challenge to subpoenaed evidence based on defendant's privilege against self-incrimination). In so doing, the courts

have recognized that such evidentiary challenges are best resolved in the adversary arena of a criminal trial United States v. Short, 671 F.2d 178, 183 (6th Cir. 1982), cert. denied, 457 U.S. 1119, 102 S.Ct. 2932, 73 L.Ed.2d 1332. In order to ensure that trials and not pretrial inquiries into the grand jury process resolve such challenges, the courts have attached a presumption of regularity to grand jury proceedings. See United States v. Woods, 544 F.2d 242, 250 (6th Cir. 1976), cert. denied, 429 U.S. 1062, 97 S.Ct. 787, 50 L.Ed.2d 778 (1977); Beverly v. United States, 468 F.2d 732, 743 (5th Cir. 1972).

Notwithstanding these limitations on a defendant's ability to challenge the evidence presented to a grand jury, the cases do recognize that defendants may overcome the presumption of regularity

which attaches to grand jury proceedings and obtain dismissal of indictments returned against them on a proper showing of grand jury abuse. United States v. Samango, 607 F.2d 877, 881 (9th Cir. 1979). Defendants may establish such grand jury abuse by demonstrating that the prosecutor obtained an indictment by knowingly submitting perjured testimony to the grand jury. United States v. Thompson, 576 F.2d 784, 786 (9th Cir. 1978), United States v. Kennedy, 564 F.2d 1329, 1338 (9th Cir. 1977), cert. denied, 4335 U.S. 944, 98 S.Ct. 1526, 55 L.Ed.2d 541 (1978). The courts reason that such conduct is arbitrary and capricious and therefore violates due process or that such conduct must be condemned in the exercise of the courts' supervisory powers. United States v. Al Mudarris, 695 F.2d 1182, 1185 (9th Cir. 1983), cert.

denied, 461 U.S. 932, 103 S.Ct. 2097, 77 L.Ed.2d 305. Indeed, a decision of this court requires a prosecutor who discovers perjury by a grand jury witness after indictment to inform the defendant, the trial court, and the grand jury of the perjury so that the grand jury may reconsider its decision to indict. United States v. Basurto, 497 F.2d 781, 785-86 (9th Cir. 1974).

The cases agree, however, that perjury before a grand jury must be material to justify dismissal of the indictment. United States v. Bracy, 566 F.2d 649, 655 (9th Cir. 1977), cert. denied, 439 U.S. 818, 99 S.Ct. 79, 58 L.Ed.2d 109 (1978); United States v. Bowers, 534 F.2d 186, 193 (9th Cir. 1976) (per curiam), cert. denied, 429 U.S. 942, 97 S.Ct. 360, 50 L.Ed.2d 311; Coppedge v. United States, 311 F.2d 128,

132 (D.C. Cir. 1962). Moreover, courts should not presume that perjured testimony was material. United States v. Kaplan, 554 F.2d 958 (9th Cir. 1977) (per curiam), cert. denied, 434 U.S. 956, 98 S.Ct. 483, 54 L.Ed.2d 315. As a consequence, if sufficient non-perjurious testimony exists to support the indictment, the courts will not dismiss the indictment due to the presence of perjured testimony before the grand jury, on the assumption that the grand jury would have returned an indictment without the perjurious evidence. Coppedge v. United States, 311 F.2d at 131-32. In a similar vein, other courts confronted with evidence of perjured testimony before a grand jury presume that no prejudice thereby resulted to defendant and therefore refuse to dismiss the grand jury's indictment. United States v. Adamo, 742 F.2d 927, 941 (6th Cir. 1984).

In the case before us, defendant contends that the perjurious testimony of Joseph Conforte before the grand jury did result in actual prejudice because the grand jury would not have returned an indictment without it. There is no evidence to support these assertions. The defenant has made no showing, beyond mere speculation, that Conforte gave perjured testimony before the grand jury or at the first trial. Nor has he made any showing that the Government had any reason to believe that Conforte's testimony was perjured.[2] Speculation cannot justify

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2. We note that defendant alsc raises objections to the manner in which the Government procured Conforte's testimony. Specifically, defendant contends that the Government's deal with Conforte, under which Conforte agreed to testify truthfully before all grand and petit juries and the Government agreed to recommend a reduction in Conforte's previously imposed sentence for tax fraud, among other offenses, was fundamentally unfair. We disagree, and observe that the agreement

this court's intervention into the grand jury's proceedings. See United States v. Chanen, 549 F.2d 1306, 1312 (9th Cir. 1977) (discussing separation of powers reasons for court's refusal to intervene in grand jury proceedings), cert. denied, 434 U.S. 825, 98 S.Ct. 72, 54 L.Ed.2d 83. Under these circumstances, the Government's presentation of Conforte's testimony to the grand jury was not the sort of

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did not make any or all benefits to Conforte contingent on defendant's indictment or conviction. See United States v. Dailey, 759 F.2d 192, 197 (1st Cir. 1985). Thus, the agreement did not present an invitation to perjury. Id. We note, in addition, that the district court correctly determined that defendant lacked standing to contest the reduction of Conforte's sentence. Finally, we note that defendant misinterprets this court's construction of the 120-day period set forth in Rule 35(b) of Federal Rules of Criminal Procedure. Contrary to defendant's assertion, this court allows reduction of sentence within a reasonable time following the expiration of 120 days. United States v. Smith, 650 F.2d 206 (9th Cir. 1981).

flagrant misconduct required to justify dismissal of the indictment under the Due Process Clause or our supervisory powers. United States v. Sears, Roebuck & Co., 719 F.2d 1386, 1391-92 (9th Cir. 1983), cert. denied, U.S. , 104 S.Ct. 1441, 79 L.Ed.2d 762 (1984).

Moreover, even if Conforte perjured himself before the grand jury, we note that Conforte's testimony related only to Counts I through IV of the indictment, and that the Government moved to dismiss these "Conforte" counts before proceeding to trial (for the second time) against defendant. Thus, any perjury committed by Conforte before the grand jury was not material to defendant's indictment on Counts V and VII and necessarily was not material to defendant's conviction on Counts V and VI. See United States v. Bracy, 566 F.2d 649, 656 (9th Cir.1977)

(defining material perjury as evidence that creates a reasonable doubt with respect to defendant's guilt that did not otherwise exist), cert. denied, 439 U.S. 818, 99 S.Ct. 79, 58 L.Ed.2d 109 (1978). See also Laughlin v. United States, 385 F.2d 287, 291 (D.C.Cir.1967) (examining taint solely with respect to the charges of which defendant was convicted), cert. denied, 390 U.S. 1003, 88 S.Ct. 1245, 20 L.Ed.2d 103 (1968). Indeed, Conforte did not appear as a witness at defendant's second trial. Under these circumstances, this court perceives no prejudice resulting from the presentation of Conforte's testimony to the grand jury. In any event, there can be no claim, and there is no claim, that there was insufficient non-perjured evidence to justify the indictment of the defendant on the tax counts and the ethics

count. See Talamante v. Romero, 620 F.2d 784, 791 (10th Cir.1980) (finding it unlikely the grand jury would have declined to indict defendant in view of the petit jury's finding of guilt after a full trial), cert. denied, 449 U.S. 877, 101 S.Ct. 223, 66 L.Ed.2d 99. As a result, we find that the trial judge committed no abuse of discretion in refusing to dismiss defendant's indictment due to presentation of perjury before the grand jury. United States v. Noti, 731 F.2d 610, 613 (9th Cir.1984).

2. Obtaining access to defendant's tax returns for use in a non-tax case.

Next, defendant challenges the manner in which the prosecution obtained access to defendant's tax returns. Defendant asserts that the prosecution obtained access to the returns in violation of 26 U.S.C. § 6103(a), because the prosecution sought the returns for use in a judicial

proceeding relating to tax administration while claiming to seek the returns for use in a non-tax case. Defendant asserts that the procedures required for disclosure in tax-related cases are more stringent than those required for disclosure in non-tax cases. Specifically, defendant contends that Internal Revenue Service guidelines require routine procedures including audits and conferences between Internal Revenue Service and Department of Justice officials before transfer of a case from the Internal Revenue Service to the Department of Justice. Defendant contends that these routine steps were not taken here and that, therefore, the prosecution should not have submitted the returns to the grand jury.

We disagree. First, although 26 U.S.C. § 6103(a) protects an individual's privacy interest in his or her tax returns

and tax return information, subsections (h) and (i) of that section permit disclosure of tax returns to federal officers and employees in both tax and non-tax cases. 26 U.S.C. § 6103(a), (i) (1985 Supp.); 26 U.S.C. § 6103(h) (1980). Contrary to defendant's assertions, these subsections prescribe more severe procedures for access to tax returns in non-tax cases than in tax cases. Id. See also United States v. Mangan, 575 F.2d 32, 38 (2d Cir.1978), cert. denied, 439 U.S. 931, 99 S.Ct. 320, 58 L.Ed.2d 324.

In this case, the district court granted disclosure of defendant's tax returns to the Department of Justice pursuant to 26 U.S.C. § 6103(i) for use in the prosecution's bribery case against defendant. 26 U.S.C. § 6103(i) (1985 Supp.). We find that this disclosure was proper. We note that the prosecution

could also have obtained access to the returns for use in its tax case against defendant, by virtue of section 6103(h). 26 U.S.C. § 6103(h) (1980).[3] As a result, even if the district court's disclosure of defendant's tax returns under section 6103(i) was improper, any error thereby resulting to defendant was harmless. Cf. Davidson v. Brady, 559 F.Supp. 456, 461 (W.D.Mich.1983). We additionally acknowledge, and concur with, the many cases holding that suppression of a defendant's tax return is an inappropriate remedy even in cases of plain error. Marvin v. United

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3. Although defendant claims that Internal Revenue Service guidelines specified several procedural steps to be taken prior to release of tax information in tax-related cases, defendant concedes that no case requires adherence to any such guidelines. We note that In re Gruberg, 453 F.Supp. 1225, (S.D.N.Y.1978) stands for a contrary proposition because the case acknowledges that a grand jury inquiry can go forward without a recommendation from the Internal Revenue Service to the Department of Justice.

States, 732 F.2d 669, 673 (8th Cir.1984); United States v. Barnes, 604 F.2d 121, 146 (2d Cir.1979), cert. denied, 446 U.S. 907, 100 S.Ct. 1833, 64 L.Ed.2d 260 (1980).

3. Investigation by three grand juries

Third, defendant contends that the prosecution's presentation of the same or similar evidence to three grand juries constituted an abuse of the grand jury process in violation of Petite v. United

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We note, in addition, that many cases refuse to dismiss indictments based on challenges involving a federal agency's failure to adhere to its own guidelines. United States v. Wilson, 614 F.2d 1224, 1227 (9th Cir.1980); United States v. Welch, 572 F.2d 1359, 1360 (9th Cir.1978) (per curiam); cert. denied, 439 U.S. 842, 99 S.Ct. 133, 58 L.Ed.2d 140. Finally, we note that defendant's challenge to the use of his tax returns in procuring his indictment resembles the type of evidentiary challenge to grand jury procedures foreclosed by the Supreme Court in United States v. Costello, 350 U.S. 359, 76 S.Ct. 406, 100 L.Ed. 397 (1956), and its progeny.

States, 361 U.S. 529, 80 S.Ct. 450, 4 L.Ed.2d 490(1960), because it bifurcated the prosecution's investigation of defendant's case. Successive grand juries impaneled in Portland, Oregon, investigated defendant's case but for the reasons stated above did not return an indictment against him. The third grand jury, impaneled in Reno, Nevada, returned the indictment involved in this appeal.

In United States v. Thompson, 251 U.S. 407, 413-14, 40 S.Ct. 289, 291-92, 64 L.Ed. 333 (1920), the Supreme Court accepted the Government's contention that a Grand jury's power is continuous and that adverse action or failure to act by a previous grand jury does not limit or exhaust a successor grand jury's power to investigate. Rule 6(e)(3)(C)(iii) of the Federal Rules of Criminal Procedure furthermore authorizes transfer of one

grand jury's material to another grand jury without court order. FED.R.CRIM.P. 6(e)(3)(C)(iii). The Rule thus contemplates that successive grand juries may investigate the same or similar crimes. Consequently, this court holds that the prosecution's presentation of evidence to three grand juries in this case violated no procedural rule or judicially-imposed limits on a grand jury's investigatory role.

The presentation of evidence to three grand juries additionally did not violate the Supreme Court's decision in Petite, 361 U.S. 529, 80 S.Ct. 450, 4 L.Ed.2d 490 (1960). In Petite, the Supreme Court granted the Government's motion to dismiss a federal indictment returned by a grand jury in violation of a Department of Justice policy forbidding successive state and federal prosecutions for the same

crime. Id. at 530, 80 S.Ct. at 451. In Petite, the Supreme Court did not forbid, or even criticize the investigation of one crime by successive grand juries. In this case, although three grand juries investigated defendant's course of conduct, only one grand jury returned an indictment against him. The Government's presentation of evidence to these grand juries thus violated neither the letter nor the spirit of Petite.

Moreover, even if the Government's presentation of evidence to three grand juries could be considered to have violated the Supreme Court's decision in Petite, a Petite violation does not compel dismissal of an indictment. United States v. Garner, 632 F.2d 758, 761 (9th Cir. 1980), cert.denied, 450 U.S. 923, 101 S.Ct. 1373, 67 L.Ed.2d 351 (1981); United States v. Smith, 595 F.2d 1176,

1181 (9th Cir.1979); United States v. Snell, 592 F.2d 1083, 1087 (9th Cir.1979), cert. denied, 442 U.S. 944, 99 S.Ct. 2889, 61 L.Ed.2d 315. As a result, this court would not order dismissal of the indictment returned against defendant even if the facts of this case presented a violation of Petite.

4. Employment of grand jury agents

Finally, defendant contends that this court must order dismissal of the indictment because the prosecution employed the service of certain "grand jury agents" in investigating this case, and thereby overrode the independence of the grand jury. We note that the foreman of the two Portland grand juries administered an oath to one Internal Revenue Service agent and four Federal Bureau of Investigation agents, to the effect that the agents would report back to the grand jury the

findings of their investigations and return to the grand jury any documents of which the grand jury should be made aware. The grand jury agents served subpoenas duces tecum upon various persons, which informed those persons that they could deliver the subpoenaed documents either to the grand jury agents or to the grand jury itself. The grand jury agents additionally examined the subpoenaed documents and discussed among themselves the relevance of the subpoenaed documents to the investigation. One grand jury agent, shortly before his swearing-in, informed the recipient of such a subpoena that the grand jury would swear him in as its agent in the near future. This agent later testified at length before the indicting grand jury in Reno.

The various cases addressing the propriety of employment of grand jury

agents recognize that the Federal Rules of Criminal Procedure do not authorize such grand jury personnel. See United States v. Kilpatrick, 594 F.Supp. 1324, 1344 (D.Colo.1984). appeal docketed, No. 84-2481 (10th Cir. Oct. 24. 1984). These cases analyze the employment of grand jury agents as a problem of unauthorized disclosure of grand jury material or as a problem of unauthorized presence during grand jury deliberations. Id. at 1329-30; United States v. Carcaise, 442 F.Supp. 1209, 1210 (M.D.Fla.1978). Both problems present violations of Rule 6 of the Federal Rules of Criminal Procedure. FED.R.CRIM.P.6(d) (setting forth who may be present during grand jury deliberations); FED. R. CRIM. P. 6(e) (setting forth the circumstances under which, and to whom, disclosure of grand jury materials is proper). The cases acknowledge,

however, that the danger arising from the employment of grand jury agents derives from the risk that such agents will override the independence of the grand jury, whether the employment of such agents is classified as an unauthorized presence or as an unauthorized disclosure. As the court noted in United States v. Anderson, 577 F.Supp. 223 (D. Wyo. 1983), appeal docketed, No. 83-2519 (10th Cir. Nov. 17, 1983)(argued April 18, 1985):

> The most important function of a grand jury is to stand between prosecuting authorities and the suspect as an unbiased valuator of evidence. That function cannot be maintained or understood by society when citizens are confronted by law enforcement agents who claim to be alter egos of the grand jury.... A grand jury that has become identified in the eyes of lay witnesses before it with law enforcement agents is not functioning independently of the prosecution. Such identification can only undermine public confidence that the grand jury is performing

> its constitutional function to check the power of the government.

Id. at 232.

Only two cases, to our knowledge, have ordered dismissal of an indictment due to the employment of grand jury agents. United States v. Kilpatrick, 594 F.Supp. at 1353 (D. Colo. 1984)(appeal docketed as previously noted); United States v. Anderson, 577 F.Supp. at 234 (D. Wyo. 1983) (appeal docketed as previously noted). These cases, decided by the same district judge, involved conduct of a substantially more egregious nature than that alleged here. In Kilpatrick, for example, the prosecutor and not the foreman of the grand jury administered oaths to the agents. 594 F.Supp. at 1328. In addition, the agents appeared together as witnesses before the grand jury, outside the presence of Government coun-

sel. Id. at 1330. Moreover, the court believed that the agents had remained present during an important colloquy between the prosecutor and the grand jurors. Id. Finally, the court suggested that the grand jury agents in fact were using their access to grand jury materials to further civil enforcement purposes of the Internal Revenue Service. Id. at 1331. In Anderson, the grand jury agents informed recipients of grand jury subpoenas that they were agents of the grand jury. 577 F.Supp. at 232. In addition, one grand jury agent informally granted immunity to a grand jury witness. Id.

In this case, only one grand jury agent revealed his (future) status as a grand jury agent to one recipient of a grand jury subpoena. No grand jury agent sought to immunize the testimony of grand jury witnesses from future prosecution.

Moreover, the trial court gave no indication that it thought the grand jury agents were misusing their access to grand jury materials for civil enforcement purposes. Under these circumstances, this court finds the use of grand jury agents in this case similar to the use of postal employees in United States v. Carcaise, 442 F.Supp. at 1212, which was to gather and summarize grand jury evidence. Like the court in Carcaise, id., this court holds that the employment of grand jury agents does not justify dismissal of the indictment.

We note, in addition, that Federal Rule of Criminal Procedure 6(e)(3)(A)(ii) authorizes disclosure of grand jury materials to federal officials such as the Federal Bureau of Investigation and Internal Revenue Service agents who assisted the prosecution in collecting

evidence for the grand jury in this case. FED.R.CRIM.P. 6(e)(3)(A)(ii). See also In re Gruberg, 453 F.Supp. 1225, 1233-34 (S.D.N.Y.1978). We furthermore observe that the prosecution disclose the names of these agents to the district court. See Fed.R.Crim.P. 6(e)(3)(B). Because the district court, after a hearing, did not believe that these agents sought access to the grand jury's materials for purely civil purposes, and because the record itself suggests no such intention, disclosure to the agents was proper under Rule 6(e)(3)(A)(ii) and did not require a court order pursuant to Rule 6(e)(3)(C). See generally United States v. Sells Engineering, Inc., 463 U.S. 418, 103 S.Ct. 3133, 77 L.Ed.2d 743 (1983). We note that the legislative history to Rule 6(e)(3)(C)(iii) suggests an assumption on the part of Congress that FBI and IRS

agents would perform investigatory functions preceding grand jury indictments. S.REP. NO. 95-354, 95th Cong., 1st Sess. 6, reprinted in 1977 U.S.CODE CONG. & AD.NEWS 527, 530. As a result, the five FBI and IRS agents in this case properly gained access to the grand jury's material.

We find no indication in the record that any one of the five grand jury agents remained presend during the grand jury's consideration of unrelated evidence or during colloquies between the prosecutor and the grand jury. Thus the record suggests no unauthorized presence violation of Rule 6(d). FED.R.CRIM.P. 6(d). The one grand jury agent who appeared as a grand jury witness properly was present before the grand jury under the terms of the Rule.

Under the circumstances of this case, we find that the employment of grand jury

agents did not override the independence of the grand jury. We observe, however, that the assistance of such federal employees, though essential to the progress of many complex or controversial investigations, may raise the possibility of claims of error unnecessarily.

C. Sufficiency of the Evidence

Defendant's third contention challenges the sufficiency of the Government's evidence to support the jury's guilty verdicts on Counts V and VI. Counts V and VI charged that defendant willfully subscribed, under penalties of perjury, his 1979 and 1980 tax returns even though defendant did not believe the returns to be true and correct in material matters. 26 U.S.C. § 7206(1) (1967). Specifically, Counts V and VI charged that defendant grossly underreported, in his 1979 and 1980 tax returns, the amount of legal fees

he received from his prior law firm for work he had performed before becoming a judge. The Government contends that defendant received approximately $41,000 in fee income tax in the 1979 tax year although defendant's 1979 tax return reported that he had only received approximately $22,000 in fee income that year. The Government furthermore contends that defendant received approximately $88,000 in fee income during the 1980 tax year although defendant's 1980 return reported no fee income. Defendant maintains that the fee income which he received during the 1980 tax year was included in a $150,000 figure representing the sale price of defendant's interest in his prior law firm. The 1980 return reported the $150,000 sale price price in a Schedule D in which defendant claimed a $100,000 capital loss on the sale of his interest

in the firm. Defendant later conceded that the 1980 return inappropriately characterized his fee income during that year as a capital gain.

The Government proffered substantial evidence to support its claim that defendant had willfully underreported his fee income in the 1979 and 1980 returns. The Government submitted, for example, duplicates of checks sent to defendant from attorneys working for his prior law firm, representing the fee income that defendant had earned before becoming a judge. The Government also submitted various bank records setting forth amounts that defendant deposited in his personal account after he received the fee income checks. Both parties agree that defendant did not deposit all of the checks but, rather, cashed several of the checks at neighborhood casinos. The Government's evidence

suggested that defendant reported on his 1979 and 1980 tax returns all checks which he deposited, but failed to report any of the checks which he cashed at casinos.

The Government furthermore offered in evidence correspondence between defendant and Joseph Wright, the accountant who prepared defendant's 1979 tax return. This correspondence demonstrated that defendant supplied Wright with an estimate of his 1979 fee income which understated defendant's actual fee income by approximately $19,000. Other documentary evidence submitted by the Government demonstrated that Wright relied on this estimate in preparing defendant's financial status to a lender from whom defendant was seeking a mortgage.

With respect to defendant's 1980 return, the Government offered as evidence defendant's sudden firing of Wright after

thirty years of service and hiring of Jerry Watson, head of Creative Tax Planning. Watson prepared defendant's 1980 return, for which defendant paid Watson $2,000 as compared to the $600 fee he had paid Wright. The Government also submitted defendant's request for an extension of time to file his 1980 return, which defendant prepared himself, in which defendant estimated his tax liability would exceed $42,000. The 1980 return, however, claimed a refund in excess of $44,000. Watson completed the 1980 return in pencil, and left erratic marks in the margin of the return and elsewhere. Defendant's counsel conceded at oral argument that the return cried out for an audit.

Defendant did not seek to rebut all of the evidence offered by the government to prove that defendant willfully under-

stated his 1979 and 1980 taxable income. Rather, defendant, while testifying at trial, consistently asserted that the understatements were not willfull because he relied in good faith on the expertise of Wright and Watson when he signed his 1979 and 1980 returns. Defendant maintains that he made full disclosure to Wright and to Watson of all income he received during these years, and that he justifiably relied on their tax advice when he signed the returns which they had prepared for him. A major dispute between the parties at trial centered around a letter allegedly delivered personally by defendant's secretary to Wright in which defendant claims to have disclosed accurately his 1979 fee income. Defendant's secretary, Judy Ahlstrom, testified that she delivered the letter to Wright's office. Wright testified at trial that he

did not receive the letter and that he never lost documents from his clients.

With respect to his 1980 return, defendant contends that his sudden hiring of Jerry Watson does not indicate an intent to understate his fee income, but simply a lawful desire to change accountants. Defendant asserts that the fee paid to Watson was not unreasonably high, but rather that the fee charged by Wright was unreasonably low. Defendant maintains that he innocently relied on Watson's ability to prepare correctly his 1980 return, and, because defendant was generally ignorant of th niceties of the tax law, he had no reason to doubt its accuracy. All of this, defendant contends, proves a lack of willfullness on his part in subscribing his name to the 1980 return.

There is no claim, however, that

Judge Hoffman erred in charging the jury. Therefore we have only to decide whether the Government presented enough evidence from which a jury, rationally could have concluded that Claiborne willfully filed false income tax returns. We regard the Government's evidence as ample.

Proof of willfulness is essential to support a conviction under section 7206 (1). United States v. Bishop, 412 U.S. 346, 361, 93 S.Ct. 2008, 2017, 36 L.Ed.2d 941 (1973); United States v. Pallan, 571 F.2d 497, 501 (9th Cir. 1978). To prove willfulness, the Government must show that defendant intended to violate the law or knew that his actions would do so. United States v. Pomponio, 429 U.S. 10, 12, 97 S.Ct. 22, 23, 50 L.Ed.2d 12 (1976) (per curiam). The cases make clear that neither a careless disregard whether one's actions violate the law nor gross

negligence in signing a tax return will suffice. United States v. Loney, 719 F.2d 1435, 1436 (9th Cir.1983). The Government, however, may base its proof of willfulness on circumstantial evidence indicating that defendant knew or must have known that his returns were false. Black v. United States, 309 F.2d 331, 342 (8th Cir.1962) (inferring willfulness from any conduct the likely effect of which is to mislead or conceal).

In addition, a defendant may rebut the Government's proof of willfulness by establishing good faith reliance on a qualified accountant after full disclosure of tax-related information. Bursten v. United States, 395 F.2d 976, 981 (5th Cir.1968), cert. denied, 409 U.S. 843, 93 S.Ct. 44, 34 L.Ed.2d 83 (1972). As the Seventh Circuit recently observed in United States v. Whyte, 699 F.2d 375

(7th Cir.1983):

> It is a valid defense to a charge of filing a false return if a defendant provides full information regarding his taxable income and expenses to an accountant qualified to prepare federal tax returns, and . . . the defendant adopts and files the return as prepared without having reason to believe it is incorrect.

Id. at 379.

On the other hand, a defendant cannot shift his responsibility for deficiencies to an accountant if the defendant has withheld vital information or has taken steps to mislead his accountant. United States v. Garavaglia, 566 F.2d 1056, 1060 (6th Cir. 1977); Bender v. Commissioner, 256 F.2d 771, 774 (7th Cir. 1958).

In the case of Claiborne's 1979 tax return, the parties hotly disputed whether defendant made full disclosure of his 1979 fee income to Joseph Wright. As we have

noted, defendant claims that he made full disclosure in a letter delivered by his secretary to Wright's office. Wright, on the other hand, testified that he received no such letter. The resolution of that factual dispute was of course for the jury and we see no basis to question its determination to credit Wright's testimony over that of Claiborne and his secretary. Because we must draw all reasonable inferences from the evidence in favor of the Government, we cannot find that the jury incorrectly disregarded defendant's reliance defense. Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 57 L.Ed.2d 1 (1979); United States v. Beecroft, 608 F.2d 753, 756 (9th Cir.1979); Cosby v. Jones, 682 F.2d 1373, 1382 (11th Cir.1982). We observe, in addition, that the jury, in viewing the Government's evidence that defendant incorrectly stated

his 1979 fee income in a different letter to Wright and the Government's evidence that defendant failed to report any checks cashed at casinos, may have decided that defendant deliberately sought to mislead Wright and therefore was not entitled to invoke the reliance defense. United States v. Scher, 476 F.2d 319, 321 (7th Cir.1973). We observe that the amounts of the checks defendant cashed at casinos were large (in one instance as large as $3,000), appearing to be more than mere pocket money. We therefore determine, after reviewing evidence, that a rational trier of fact could have found defendant guilty beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. at 319, 99 S.Ct. at 2789; Burks v. United States, 437 U.S.1, 17, 98 S.Ct. 2141, 2150, 57 L.Ed.2d 1 (1978).

We base our conclusion with respect

to the 1980 return on similar grounds. Here, the crucial issue before the jury was not whether defendant made full disclosure to Jerry Watson, but rather whether he relied in good faith on Watson's advice. Defendant's own understanding of tax issues is highly relevant to the question of his good faith reliance on Jerry Watson. See United States v. Whyte, 699 F.2d at 380. The parties agree that defendant presided as district court judge over some tax law disputes. Nevertheless, defendant consistently has maintained that he is not a tax expert and has had no significant experience with the distinction between ordinary income and capital gain.

The jury obviously did not believe defendant and found his claims of ignorance to be disingenuous. The support for that conclusion is strong. We assume that

defendant gained some familarity with concepts as basic to the tax law as the distinction between ordinary income and capital gain during his law school studies, his thirty odd years of practicing law, and his three years on the bench before filing the 1980 return. Compare Lurding v. United States, 179 F.2d 419, 420 (6th Cir.1950) (where defendant was uneducated and unfamiliar with taxes, bookkeeping and accounting). We note that defendant reported his fee income as ordinary income in all years previous to 1980, when he reported the income as a capital gain. We observe, in addition, that defendant reviewed the 1980 return for ten or fifteen minutes before signing his name to it. During this time, defendant must have seen, at the least, that Watson had completed the return erratically, and in pencil. Defendant most likely

also observed at this time that Watson's return reported no fee income.

In reviewing the jury's decision to convict, we must draw all reasonable inferences from the evidence in favor the the Government. United States v. Spetz, 721 F.2d 1457, 1477 (9th Cir.1983). On this record, we have no trouble concluding that a rational trier of fact could have found defendant guilty of Count V and Count VI beyond a reasonable doubt. See United States v. Des Jardins, 747 F.2d 499, 507 (9th Cir.1984).

D. Trial Errors

Defendant's final contentions on appeal relate to various alleged errors made by the district court prior to and during defendant's second trial. Four of these alleged errors merit discussion.

1. Failure to excuse for cause two prospective jurors

First, defendant asserts that the

district court's refusal to excuse for cause two prospective members of the jury unconstitutionally forced him to exercise two of his allotted peremptory challenges, all of which he eventually exhausted, thereby forfeiting his right to exercise those challenges against two other veniremen and impairing his Sixth Amendment right to an impartial jury. See United States v. Martin, 749 F.2d 1514, 1518 (11th Cir.1985). Defendant contends that these two prospective jurors exhibited actual bias towards him and thus the district court should have granted his motions to excuse them from jury service for cause. Defendant also claims that the district judge asked these two prospective jurors leading questions, which did not elicit objectively whether the jurors could decide the case without bias or prejudice. We disagree with this charac-

terization of the judge's colloquies with the jurors and find that the judge fairly gave them the opportunity to reveal, without embarrassment, any bias or prejudice which they felt against defendant.

Defendant does not contend, however, that the jury which convicted him was biased. Rather, his objection to the district court's failure to exclude the two prospective jurors rests on the theory that it is constitutionally impermissible to force defendants to exhaust their peremptory challenges on persons who should be excused for cause. See United States v. Daly, 716 F.2d 1499, 1507 (9th Cir.1983), cert. dismissed, U.S. , 104 S.Ct. 1456, 79 L.Ed.2d 773 (1984); United States v. Allsup, 566 F.2d 68, 71 (9th Cir. 1977). We agree, and reaffirm that the peremptory challenge is an important safeguard of a defendant's Sixth

Amendment right to an impartial trial. See Hines v. Enomoto, 658 F.2d 667, 672 (9th Cir.1981); United States v. Giacalone, 588 F.2d 1158, 1164 (6th Cir. 1978), cert. denied, 441 U.S. 944, 99 S.Ct. 2162, 60 L.Ed.2d 1045 (1979). See also Rosales-Lopez v. United States, 451 U.S. 182, 188 n. 6, 101 S.Ct. 1629, 1634 n. 6, 68 L.Ed.2d 22 (1981); Swain v. Alabama, 380 U.S. 202, 219, 85 S.Ct. 824, 835, 13 L.Ed.2d 759 (1965).

Even though this court agrees that forcing a defendant to expend peremptory strikes may implicate the Sixth Amendment. Celestine v. Blackburn, 750 F.2d 353, 360 (5th Cir.1984), a constitutional problem only arises in cases where a prospective juror upon whom defendant spent a peremptory challenge was actually biased and therefore should have been excluded by the trial judge. United States v. Allsup, 566

F.2d at 71. That is not the case here. One prospective juror, Robert Whitten, indicated during voir dire that he had a preconception of defendant's guilt or innocence and that defendant would have to come forward with evidence to overcome this preconception. The trial judge then instructed Whitten that a criminal defendant enjoyed a constitutional presumption of innocence and made clear to Whitten that defendant did not have to come forward with proof of innocence but rather the prosecution had to come forward with proof of defendant's guilt beyond a reasonable doubt. Whitten subsequently indicated that he would decide defendant's guilt or innocence impartially, on the evidence presented at trial and according to the law charged by the court.

A second prospective juror, Susan Varnum, indicated during voir dire that

she did not like defendant's appearance and admitted that she had formed an opinion on defendant's guilt or innocence as a result of the media coverage of defendant's case. Varnum also indicated, however, that she did not believe in trying cases through the newspapers and that defendant would not have a burden to overcome due to her personal attitude towards his appearance. Varnum furthermore expressed to the trial court that she was willing and able to judge the evidence in the case in an impartial manner.

Under these circumstances, we cannot find that the district court committed a manifest error or an abuse of its broad discretion in failing to excuse for cause jurors Whitten and Varnum. Celestine v. Blackburn, 750 F.2d at 360, United States v. Giacalone, 588 F.2d at 1164. Few aspects of a jury trial are

more committed to a district court's discretion than the decision whether to excuse a prospective juror for actual bias. United States v. Gullion, 575 F.2d,26, 29 (1st Cir.1978). Moreover, trial courts possess a peculiar ability to determine whether a prospective jurors claimed ability to decide a case impartially is genuine. Patton v. Yount, U.S. ___, 104 S.Ct. 2885, 81 L.Ed.2d 847 (1984). A prospective juror's statement that he has some impression about the case or a party is a frank and honest answer to the court's inquiry, and the juror's statement that he can lay aside his impressions and decide the case on the evidence presented and the charge of the court should also be weighed in the discretion of the trial judge.

Here, the district court determined, based on the prospective jurors' respon-

ses, that Whitten and Varnum would weigh the evidence in the case impartially despite their initial preconceptions of defendant's guilt or innocence. We do not find this decision an abuse of the district court's discretion. Indeed, the fact that defendant took advantage of his peremptory challenges to strike Whitten and Varnum may reflect "not a denial of justice," but a proper utilization of the peremptory tool. United States v. Giacalone, 588 F.2d at 1164.

2. Failure to order disclosure of Jencks Act Statements

Second, defendant contends that the district court committed reversible error because the court erroneously declined to provide the defense, pursuant to the terms of the Jencks Act, 18 U.S.C. § 3500 (1985), certain "302" summaries of FBI interviews with a key Government witness,

concluding that the summaries did not contain material subject to disclosure under the Act. Specifically, defendant maintains that the district court improperly refused to disclose statements made by Joseph Wright to FBI agents during interviews with Wright prior to trial. Defendant contends that these statements would have impeached Wright's trial testimony and because Wright's testimony materially affected the jury's decision to convict him, that the court's refusal to disclose these statements would have impeached Wright's trial testimony and because Wright's testimony materially affected the jury's decision to convict him, that the court's refusal to disclose these statements prejudicially affected defendant's substantial rights.

One such statement suggested that Wright had misplaced or destroyed pre-1976

records during his move to a new office. Wright testified that he did not lose or misplace any records pertaining to defendant. Defendant maintains that Wright's loss of pre-1976 records may have suggested to the jury the possibility that Wright mistakenly included a letter written by defendant to Wright in 1980 in the records that Wright lost or destroyed before he moved to new quarters. Other statements included a reference by Wright to a Mr. Swanson, who helped Wright in his accounting business, a statement by Wright that he did not "cross-examine" his clients, and a statement by Wright that his work for defendant decreased when defendant became a judge. The trial court refused to order disclosure of this material on the ground that the summaries containing this material were not in fact "statements" by witness Wright.

In reviewing the district court's refusal to disclose the 302 forms to defendant, this court must ponder two questions. First, we must consider whether the 302 forms included "statements" of witness Wright within the meaning of the Jencks Act. Second, we must consider whether, assuming the 302 forms did contain such statements, the district court's refusal to order their disclosure prejudicially affected defendant's substantial rights. United States v. Long, 715 F.2d 1364, 1368 (9th Cir. 1983).

The Jencks Act restrictively defines those "statements" by a witness which are subject to disclosure. Specifically, the Act provides:

> The term "statement," as used in subsections (b), (c), and (d) of this section in relation to any witness called by the

United States, means--

(1) a written statment made by said witness and signed or otherwise adopted or approved by him;

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or

(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

18 U.S.C. § 3500(e) (1985). The 302 summaries of interviews conducted by Government agents with witness Wright cannot fall within subsection (1) of 18 U.S.C. § 3500(e) because Wright did not

draft the summaries or otherwise approve their contents. Compare Goldberg v. United States, 425 U.S. 94, 103, 96 S.Ct. 1338, 1344, 47 L.Ed.2d 603 (1976). Indeed, the record is bereft of evidence to suggest that Wright saw the 302 forms at all. Similarly, the 302 summaries cannot fall within subsection (3) of 18 U.S.C. § 3500(e) because Wright did not make any "statements" contained therein to a grand jury. 18 U.S.C. § 3500(e) (1985).

Furthermore, this court finds that the 302 summaries do not fall within subsection (2) of 18 U.S.C. § 3500(e) because the summaries do not purport to transcribe in a substantially verbatim fashion Wright's various interviews with Government agents. Rather, the summaries represent, in our view, the agent's selection of certain information conveyed by Wright for possible use in the Govern-

ment's case against defendant. See Palermo v. United States, 360 U.S. 343, 355 n. 12, 79 S.Ct. 1217, 1226 n. 12, 3 L.Ed.2d 1287 (1959) (characterizing an agent's 600 word summary of a 3 1/2 hour conference with a Government witness as the agents selection of items deemed appropriate for inclusion rather than a virtually verbatim narrative of what the witness said). Accord United States v. Bernard, 625 F.2d 854, 859 (9th Cir. 1980); United States v. Edwards, 702 F.2d 529, 531 (5th Cir. 1983); United States v. Durham, 587 F.2d 799, 802 (5th Cir.1979). The summaries additionally fail to satisfy the requirements of 18 U.S.C. § 3500(e)(2) because the agent did not draft them contemporaneously with Wright's responses during the interviews 18 U.S.C. § 3500(e)(2) (1985). We believe that the district court properly characterized the summaries

as non-Jencks Act material and, therefore, correctly declined to disclose their contents to defendant. Under these circumstances, we cannot find, as we must to overturn a district court's Jencks Act decision, that the district court's characterization was clearly erroneous, United States v. Hodges, 556 F.2d 366, 368 (5th Cir.1977), cert. denied, 434 U.S. 1016, 98 S.Ct. 735, 54 L.Ed.2d 762 (1978), or an abuse of discretion, Government of Virgin Islands v. Lovell, 410 F.2d 307, 310 (3d Cir.1969), cert. denied, 396 U.S. 964, 90 S.Ct. 440, 24 L.Ed.2d 428.

Moreover, even if the district court's refusal to disclose the summaries to defendant was clearly erroneous or an abuse of discretion, we do not believe that the district court's decision prejudicially affected defendant's substantial rights. United States v. Johnson, 521

F.2d 1318, 1320 (9th Cir.1975). The only information contained in the summaries that could be damaging to Wright's credibility, and therefore helpful to the defense, is Wright's admission that he lost or mislaid some records during his move to a new office.[4] The record demonstrates, however, that defendant did cross-examine Wright with respect to this loss of records at defendant's first trial. Thus, defendant had knowledge of the loss and made use of that knowledge without access to the summaries. Under these circumstances, the court's refusal

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4. Ordinarily, the Jencks Act discourages courts from speculating on what use defendants would make of witness statements. United States v. Bibbero, 749 F.2d 581, 585 (9th Cir.1984). In the case before us, however, defendant concedes that he would have used the information relating to Wright's loss of pre-1976 records to impeach Wright's testimony that he never lost records pertaining to defendant.

to disclose the summaries to defendant did not prejudice defendant's substantial rights. Government of Virgin Islands v. Lovell, 410 F.2d at 311. See also United States v. Johnson, 521 F.2d at 1320.

3. The prosecution's failure to disclose Brady material

Third, defendant contends that the prosecution's failure, following defendant's request to deliver these 302 summaries of interviews between Government agents and Wright deprived defendant of a fair trial under Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Prior to trial, defendant requested from the Government any statements in its possession which would tend to impeach the credibility of any Government witness, including but not limited to statements contradicting other statements by such persons. Defendant asserts that the 302 summaries contained such impeachment

evidence, because the summaries suggested, among other things, that Wright may have misplaced important correspondence that he had received from defendant. Wright testified at trial that he never lost records pertaining to defendant. Defendant contends that the prosecution's failure to disclose this material might have affected the jury's verdict and consequently demands a new trial.

The Supreme Court's decision in United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976), provides the framework for our analysis of the prosecution's failure to disclose this impeachment evidence. In Agurs, the Supreme Court reaffirmed its holding in Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), that due process requires a prosecutor to disclose material exculpatory information in its

possession to defense. Id. at 105-06, 96 S.Ct. at 2398-99. The Supreme Court announced different "materiality" tests, however, according to the specificity of a defendant's request for information. Id. at 106, 112, 96 S.Ct. at 2398-2401. If a defendant made a specific request for exculpatory information, which gave the prosecution notice of exactly what the defendant desired, undisclosed exculpatory information would be material if it might have affected the outcome of defendant's trial. Id. at 106, 96 S.Ct. at 2398. On the other hand, if a defendant made either a general request for exculpatory information or made no request, the undisclosed exculpatory information would not be material unless it created a reasonable doubt that did not otherwise exist. Id. at 112, 96 S.Ct. at 2401.

Defendant's request for information

in the Government's possession which would tend to impeach the credibility of any Government witness was a general and not a specific request. See United States v. Shelton, 588 F.2d 1242, 1249 n. 10 (9th Cir.1978) (characterizing a request for everything tending to impeach the credibility of an identified witness as a general request) cert. denied, 442 U.S. 909, 99 S.Ct. 2822, 61 L.Ed.2d 275 (1979); Ostrer v. United States, 577 F.2d 782, 786 (2d Cir.1978) (characterizing a request for material useful to cross-examine an identified witness with respect to bias as a general request) cert. denied, 439 U.S. 1115, 99 S.Ct. 1018, 59 L.Ed.2d 73 (1979); United States v. DiCarlo, 575 F.2d 952, 959 (1st Cir.1978) (characterizing a request for all evidence favorable to defendant, including impeachment evidence, as a general request) cert. denied, 439

U.S. 834, 99 S.Ct. 115, 58 L.Ed.2d 129. We note that defendant's request did not focus on a particular witness, United States v. Mackey, 571 F.2d 376, 389 (7th Cir.1978), or on particular sources of witness statements, such as 302 forms. Compare United States v. Warhop, 732 F.2d 775, 778 (10th Cir.1984). Under these circumstances, we find that defendant's request did not give the prosecution notice of exactly what information defendant desired. United States v. Agurs, 427 U.S. at 106, 96 S.Ct. at 2398.

Because defendant's request was general and not specific, the prosecution's failure to disclose the impeachment evidence contained in the 302 summaries will only justify a new trial if the evidence would have created a reasonable doubt that did not otherwise exist. United States v. Agurs, Id. 427 U.S. at

112, 96 S.Ct. at 2401. See also United States v. Lasky, 548 F.2d 835, 839 (9th Cir.1977) (per curiam) cert. denied, 434 U.S. 821, 98 S.Ct.63, 54 L.Ed.2d 77. Under the circumstances of this case, we find that disclosure of evidence would have created no such doubt. We acknowledge, of course, that credibility evidence can be material. Giglio v. United States, 405 U.S. 150, 154, 92 S.Ct. 763, 766, 31 L.Ed.2d 104 (1972). We acknowledge, in addition, that nondisclosure which impairs a defendant's ability effectively to cross-examine key witnesses may threaten to deprive a defendant of a fair trial. Bagley v. Lumpkin, 719 F.2d 1462, 1464 (9th Cir. 1983), reversed on other grounds, ___ U.S. ___, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985).

Nevertheless, we find that the prosecution's failure to disclose the 302

summaries in this case did not impair defendant's ability to cross-examine Wright effectively because defendant in fact had access to the most damaging impeachment evidence contained in the summaries and used this evidence to impeach Wright's credibility at the first trial. Cf. United States v. Peters, 732 F.2d 1004, 1009 (1st Cir.1984). Accordingly, the prosecution's disclosure of the impeachment evidence contained in the summaries would have told defendant nothing of importance that he did not know already. United States v. Truong Dinh Hung, 667 F.2d 1105, 1107 (4th Cir.1981) (per curiam), cert. denied, 454 U.S. 1144, 102 S.Ct. 1004, 71 L.Ed.2d 296 (1982). Under these circumstances, we cannot find that the prosecutions's failure to turn over the 302 summaries to defendant deprived defendant of a fair trial. Cf.

United States v. Prior, 546 F.2d 1254, 1259 (5th Cir.1977).

Indeed, we would reach the same conclusion even if we construed defendant's request for impeachment evidence as a specific request, as one decision from this circuit advises us to do. United States v. Goldberg, 582 F.2d 483, 489 (9th Cir.1978), cert. denied, 440 U.S. 973, 99 S.Ct. 1538, 59 L.Ed.2d 790 (1979). Because the impeachment evidence was duplicative of information that defendant possessed prior to his second trial, we cannot find that the prosecution's failure to disclose the impeachment evidence was "material" to defendant's conviction under either standard enunciated in Agurs. United States v. Agurs, 427 U.S. at 106, 112, 96 S.Ct. at 2398, 2401. As a result, we hold that the district court correctly determined that any failure to disclose

which occurred in this case did not justify a new trial.

4. Improper sequestration of a defense witness

Finally, defendant contends that the district court committed an abuse of discretion by improperly sequestering defense witness Judy Ahlstorm during a brief recess in the middle of her testimony concerning her alleged delivery to Wright of a letter from Claiborne disclosing the full extent of his 1979 fee income. As we indicated previously, Ahlstrom was, and apparently still is, defendant's secretary of many years. Defendant asserts that the trial judge prevented defense counsel from calming Ahlstrom during this recess, even though Ahlstrom had become visibly upset during her previous testimony. Because Ahlstrom's testimony, and her credibility, were crucial to defendant's case, defen-

dant maintains that the trial court's refusal to allow defense counsel to calm her during this recess prejudicially affected the outcome of defendant's trial. We are not unmindful of the fact that this was the only instance of witness sequestration during defendant's trial. We are not persuaded, however, given the circumstances of this case, and Ahlstrom's obvious problems during her testimony, that her sequestration amounted to reversible error.

The record does not disclose why the trial judge ordered a recess, although it does reflect the court's determination that a recess at that particular time was an urgent necessity. This court will not engage in speculation as to the trial court's motives. Rather, we note the broad discretion enjoyed by a trial judge with respect to the mode of interrogating witnesses and presenting evidence, FED.R.

EVID. 611(a), and emphasize that this discretion includes the ability to order a recess as circumstances necessitate. This broad discretion over the mechanics of a trial furthermore includes the ability to order sequestration of a witness. See Geders v. United States, 425 U.S. 80, 87, 96 S.Ct. 1330, 1334, 47 L.Ed.2d 592 (1976). In Geders, The Supreme Court observed:

> Our cases have consistently recognized the important role the trial judge plays in the federal system of criminal justice. The judge is not a mere moderator but is the governor of the trial for the purpose of assuring its proper conduct and of determining question of law. A criminal trial does not unfold like a play with actors following a script; there is no scenario and can be none. The trial judge must

> meet situations as they arise and to do this must have broad power to cope with the complexities and contingencies inherent in the adversary process . . . . The judge's power to control the progress and, within the limits of the adversary system, the shape of the trial includes broad power to sequester witnesses before, during and after their testimony.

Id. at 86-87, 96 S.Ct. at 1334-1335. The Court held, however, that this broad power to sequester a witness did not include the power to impair a defendant's right to the effective assistance of counsel by ordering a defendant not to discuss his trial with his attorney during a significant recess. Id. at 91, 96, S.Ct. at 1336. Accord United States v. Romano, 736 F.2d 1432, 1435 (11th Cir.1984). We note that the trial court's sequestration of witness

Ahlstrom did not impinge upon defendant's Sixth Amendment right to the effective assistance of his counsel in this case. Thus, defendant's reliance upon cases precluding sequestration of defendants on Sixth Amendment grounds is misplaced.

Our research reveals only one case in which a court has held that sequestration of a non-party witness may constitute reversible error under Geders. United States v. Romano, 736 F.2d, at 1439. In that case, the Eleventh Circuit reversed a defendant's conviction because the trial court had prevented his co-defendant, whose testimony was crucial to the first defendant's case, from communicating with his attorney with respect to his own testimony during a recess which lasted several days. Id. The court limited its holding to the peculiar facts of the case, however, and remarked that its holding "by

no means implie[d] that a co-defendant's conviction typically will be reversed on Geders grounds." Id.

We see no reason to extend the Eleventh Circuit's holding to the facts of this case. We note that the recess in this case was brief and that Ahlstrom resumed her testimony immediately after the recess ended. The trial judge apparently ordered Ahlstrom sequestered during the recess in order to prevent improper influences upon her testimony, a purpose endorsed by the Supreme Court in Geders. Geders v. United States, 425 U.S. at 87, 96 S.Ct. at 1334. Under the circumstances of this case, we find that the trial court's sequestration of Ahlstrom during a brief recess was a proper exercise of discretion.

III. CONCLUSION

This court holds, having considered

all of the claimed errors meriting attention:

(1) that Articles I and III of the Constitution did not render defendant immune from prosecution.

(2) that the Government did not engage in unconstitutional abuse of the grand jury process,

(3) That the evidence presented at trial was sufficient to sustain defendant's conviction, and

(4) that various alleged trial errors do not mandate a new trial.

We have considered other errors advanced by defendant, explicitly or implicitly, including a suggestion that he was the victim of selective prosecution; that the trial judge improperly refused to consider the effect of the trial's publicity in the Nevada newspapers

(some of which was unfavorable to the Government); the unusual extent to which the Government gave concessions to Conforte; the Government's treatment of an IRS agent who apparently did not favor an investigation of defendant; and grand jury investigations of other persons associated with defendant. Because we find on the record an insufficient basis to justify reversal of defendant's conviction on these and other grounds, this court accordingly AFFIRMS the judgment of conviction on Counts V and VI.

FILED
MAR 5 1984

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,	No. 84-1009
v.	DC# CR-R-83-57-WEH Nevada (Reno)
HARRY EUGENE CLAIBORNE, Defendant-Appellant.	OPINION

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA
WALTER E. HOFFMAN;
SENIOR DISTRICT JUDGE, PRESIDING
ARGUED AND SUBMITTED FEBRUARY 24, 1984

Before: GIBSON, GARTH, and KENNEDY, Circuit Judges.*

PER CURIAM:

This interlocutory appeal raises anew the issue whether the United States Constitution immunizes a sitting federal

*Sitting by designation: the Honorable Floyd R. Gibson of the Eighth Circuit; the Honorable Leonard I. Garth of the Third Circuit; and the Honorable Cornelia G. Kennedy of the Sixth Circuit.

judge from criminal prosecution prior to his removal from office by the impeachment process. Appellant, Harry Eugene Claiborne, is a United States Judge for the District of Nevada. He was appointed to the bench in August, 1978. On December 8, 1983, a seven count indictment was returned against Claiborne. Count I of the indictment alleged that Claiborne solicited and received $30,000 from Joseph Conforte, a Las Vegas brothel owner, in return for being influenced in the performance of offcial acts--i.e., decisions regarding motions in a pending case. (18 U.S.C. § 201(c)). Count II alleged that Claiborne caused an interstate telephone conversation to be made in furtherance of a scheme to defraud Conforte. (18 U.S.C. § 1343). The scheme to defraud allegedly involved Claiborne's accepting $55,000 from Conforte in return for promising to

secure the reversal of Conforte's criminal tax evasion conviction by bribing one or more judges on the Ninth Circuit Court of Appeals.[1]

Claiborne's trial is scheduled to begin on March 12, 1984. On January 3, 1984, Claiborne filed inter alia a motion to quash the indictment and to dismiss the proceedings against him, claiming the Constitution prohibits the criminal prosecution of an active federal judge before he is removed from office through the impeachment process. The district

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1. Count III of the indictment charges that Claiborne obstructed the administration of justice by uring a witness to give false testimony before a federal grand jury investigating Claiborne. (18 U.S.C. § 1503). Counts IV, V, and VI charge that Claiborne failed to report the bribes as income on his tax returns. (26 U.S.C. § 72061(1)). Count VII, unrealted to the other charges, alleged that Claiborne had knowingly failed to include an outstanding $75,000 loan on the financial disclosure form he filed with the Judicial Ethics Committee (18 U.S.C. § 1001).

court judge[2] denied the motion by an amended order dated February 8, 1984. In that order, the trial court found Claiborne's claim "frivolus" and stated that the case would proceed to trial as scheduled on March 12, 1984. The district court also indicated its intention to hear other pretrial motions on February 21, 1984. Claiborne filed an interlocutory appeal of this order with the Ninth Circuit Court of Appeals. Characterizing the district court's order as "a final collateral order", Claiborne claims this interlocutory appeal vested exclusive jurisdiction in this court pursuant to 28 U.S.C. § 1291 and divested the district court of jurisdiction to proceed. Claiborne also filed an application for writ of prohibition and mandamus, seeking

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2. The Honorable Walter E. Hoffman of the Eastern District of Virginia, sitting by designation.

to stay the trial court from proceeding until this court resolved the merits of his interlocutory appeal. By an order dated February 16, 1984, we declined to stay the district court's proceedings of February 21, 1984, without prejudice. Claiborne renewed his motion for a stay on February 17, 1984.

I. Appealability

Claiborne's motion to dismiss was based upon the separation of powers principle of the Constitution and specific constitutional provisions which purportedly immunize a federal judge from criminal prosecution until he is removed from office by the impeachment process. As the parties agree, we have jurisdiction to review Claiborne's noncertified interlocutory appeal from the district court's dismissal of this claim.

Although 28 U.S.C. § 1291 limits appellate court's jurisdiction to "final decisions of the district courts", the Supreme Court has permitted departures frcm this rule where an interlocutory order falls into the "collateral order" exception announced in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 545-47 (1949). Under that exception, an interlocutory order is immediately appealable if it "conclusively determines the disputed question, resolve[s] an important issue completely separate from the merits of the action, and is effectively unreviewable on appeal from final judgment." Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978); United States v. Hollywood Motor Car Co., 458 U.S. 263, 265 (1981). In Abney v. United States, 431 U.S. 651, 659-60 (1977), the Court, applying Cohen, held that an interlocutory

order denying defendant's pre-trial motion to dismiss an indictment on double jeopardy grounds was immediately appealable. And in Helstoski v. Meanor, 442 U.S. 500, 506-08 (1979), the Court held immediately reviewable a Congressman's pretrial claim that the Speech and Debate clause immunized him from criminal prosecution. Both Abney and Helstoski, in addition to satisfying the other requirements of Cohen, involved "an asserted right the legal and practical value of which would be destroyed if it were not vindicated before trial." Hollywood Motor, 458 U.S. at 266. The defendants in those two cases raised claims based upon "the right not to be tried, which must be upheld prior to trial if it is to be enjoyed at all." United States v. MacDonald, 435 U.S. 850, 860-61 (1978).

In United States v. Hastings, 681 F.2d 706 (5th Cir.), stay denied, 103 S.

Ct. 1188 (1982), the court concluded that a claim identical to the one raised here was an appealable collateral order. The defendant there, as here, contended that, under the separation of powers principle, an active federal judge has an absolute right not to be indicted and tried in a federal court unless and until he is impeached and convicted by Congress and removed from office. The court stated:

> Like the right secured by the speech or debate clause in Helstoski or the right secured by the double jeopardy clause in Abney, the right asserted by Hastings is the freedom from the obligation to endure a criminal trial which would be wholly deprived of meaning if he were forced to undergo trial before he could assert it.
>
> (Id. at 708)

We agree with Hastings and conclude we have jurisdiction to review the merits of Claiborne's claim. See also United States v. Meyers, 635 F.2d 932, 935-36 (2nd Cir. 1980) (Congressman's claim of

immunity from criminal prosecution under separation of powers principle held immediately appealable.)

II. Merits

Article III of the Constitution affords members of the federal judiciary substantial protections to assure their freedom from coercion or influence by the executive and legislative branches. Specifically, federal judges are appointed for life terms, subject only to removal by impeachment; they hold their offices "during good behavior"; and their compensation cannot be diminished during their continuance in office. See United States ex rel. Toth v. Quarles, 350 U.S. 11, 15-16 (1955). In addition to these specific constitutional safeguards, federal judges, like state judges, enjoy an absolute common law immunity from civil liability for acts committed in their

official capacity. Stump v. Sparkman, 435 U.S. 349, 355-57 (1978).

However, in accordance with a system of checks of balances, the Framer's of the Constitution gave the legislative branch the power to deal with acts of misconduct by federal judges. Art. II, § 4 provides that "all civil officers of the United States[3] shall be removed from office on impeachment for, and conviction of, treason, bribery or other high crimes and misdemeanors". The House of Representatives is given the sole power of impeachment. Art. I, § 2. The Senate is given the sole power to try all impeachments. Art. I, § 3. The legislative power is limited insofar as the judgment entered after a conviction on impeachment cannot go beyond removal from office and disqual-

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3. Federal judges are "civil officers" within the meaning of this clause. Shurtleff v. United States, 189 U.S. 311, 316 (1903).

ification to hold future office. Art. I, § 3. Also, "the party convicted shall nevertheless be liable and subject to indictment, trial, judgment, and punishment according to law." Art. I, § 3 cl.7.

There is no specific constitutional provision limiting the executive branch's power to prosecute federal judges on criminal charges; nor is there any provision excepting federal judges from the executive branch's broad authority "to take care that the laws be faithfully executed." Art. II, § 3. Claiborne, however, contends that the Constitution's grant to the legislative branch of the power to remove a judge for high crimes and misdemeanors and the general principles of separation of powers preclude the executive branch from prosecuting hinge on criminal charges unless and

until he has been removed from office by impeachment.

Identical immunity claims were squarely faced and rejected in United States v. Hastings, 681 F.2d 706, 709-11 (5th Cir.), stay denied, 103 S. Ct. 1188 (1982) and United States v. Isaacs, 493 F.2d 1124, 1141-1144 (7th Cir.), cert. denied, 417 U.S. 976 (1974).[4] Both Hastings and Isaacs held that the Constitution does not immunize a sitting federal judge from the processes of criminal law. The sentiment underlying these holdings is that: "no man in this country is so high that he is above the law. . . . A judge no less than any other man is subject to the processes of the criminal law".

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4. Hastings and Isaacs are the only two cases where an indicted federal judge has claimed immunity from criminal prosecution prior to impeachment. Two other active federal judges were indicted on criminal charges, but neither raised the immunity issue. See Hastings, 681 F.2d at 706 n.7.

Hastings, 681 F.2d at 711; Isaacs, 493 F.2d at 1133. We wholeheartedly agree with Hastings and Isaacs and are substantially guided by them in disposing of Claiborne's arguments.

Claiborne's first argument is that specific constitutional provisions give Congress the exclusive primary jurisdiction to try and punish federal judges for high crimes and misdemeanors through the impeachment process. He principally relies upon article I, § 3 cl. 7 which states:

> Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit under the United States; but the party convicted shall, nevertheless, be liable and subject to indictment, trial, judgment, and punishment according to law.

According to Claiborne, this language means that a federal judge cannot be

indicted and tried in an Article III court unless he has been removed from office by the impeachment process. Both Isaacs and Hastings rejected this tortured interpretation, concluding that § 3 was intended "to assure that after impeachment a trial on criminal charges is not foreclosed by the principle of double jeopardy." Isaacs, 493 F.2d at 1142, citing R. Berger, Impeachment: The Constitutional Problem, at 78-80 (1973); Hastings, 681 F.2d at 710. Hastings states:

> [S]ection 3 represents an attempt by the framers to anticipate and respond to questions that might arise regarding the procedural right of the accused during the impeachment process. Like article III, § 2 cl. 3 which provides that the right to trial by jury does not extend to impeachment proceedings, section 3 serves to clarify the rights of civil officers accused of high crimes and misdemeanors, not to limit the jurisdiction of article III courts.
>
> (footnotes omitted.)

We agree with the Fifth and Seventh Circuits' reading of Article I § 3 cl. 7.

Claiborne also contends the Constitution's vesting of impeachment power exclusively in the Congress precludes criminal prosecutions of sitting federal judges. Two very important assumptions underlie this contention. First, impeachment is the exclusive means of removing federal judges from office; and second, a criminal prosecution is the equivalent of removal from office. We, like the court in Hastings, are unwilling to accept this second assumption. See Hastings, 681 F.2d at 710 n.10. In Burton v. United States, 202 U.S. 344 (1906), a United States Senator made the comparable claim that a criminal conviction was the equivalent of expulsion from the Senate, which required a two thirds vote of the Senate. The Court rejected this claim, stating: "the final judgment of conviction [does]

not operate, ipso facto, to vacate the seat of the convicted Senator, nor compel the Senate to expel him or to regard him as expelled by force alone of the judgment". Id. at 369. In Chandler v. Judicial Council of the Tenth Circuit, 398 U.S. 74 (1970), both Mr. Justice Douglas and Mr. Justice Black noted the important distinction between criminal proceedings and impeachment proceedings against federal judges. Justice Black, while emphasizing that federal judges could be removed from office only by impeachment, stated that "judges, like other people, can be tried, convicted, and punished for crimes". Id. at 141-42. Justice Douglas stated that "[i]f they [federal judges] break a law they can be prosecuted. If they become corrupt or sit in cases in which they have a personal or family stake, they can be impeached by Congress." Id. at 140. Finally, the

legislative history of the 1980 Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 (28 U.S.C. § 372) is replete with statements recognizing that while Congress retains the exclusive power to remove federal judges from office for high crimes and misdemeanors, federal judges, like other people, are subject to criminal prosecution for thir misdeeds.[5]

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5. Judicial Tenure and Discipline 1979-80: Hearings Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary, 96th Cong. 1st and 2nd Sess. (1979-80).

Hunter, Elmo B., Judge, Western District of Missouri representing the Judicial Conference of the United States testified:

> Certainly, the members of the Court Administration Committee and of the Judicial Conference have been especially sensitive to that concern. They recognize that judges have no right to be insulated from the consequences of their own misbehavior when it impairs the proper operation of the courts and the administration of justice.

[Footnote Continued]

5. Continued

> First, I would like to turn to a consideration of the kind of conduct involved in our problem. We need not discuss criminal conduct as such. Federal and State criminal statutes apply to every Federal judge just as they apply to any other citizen.

Id. at 54-55. (Emphasis added).

Rodino, Peter W. (Rep. D. NJ) Chm. House Judiciary Committee testified:

> I believe [the impeachment process] was designed so in order that we be very careful and very deliberate about the application of this process of impeachment, and I think that if we look back, we find that impeachment being an action that is taken only as of last resort, really would serve us well only in such instances and only after all other possible actions may have been taken to cure whatever the problem may have been.
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> . . .
>
> I just want to remind you that the Constitution itself provides that impeachment is no substitute for the ordinary application of the criminal laws, since in article I, section 3, it specifies that impeachment does not immunize the officer from criminal liability for his

5. Continued

> wrongdoing, and indeed may be brought to the bar of justice for the violation of any criminal statute.

Kastenmeier, Robert W., Chairman of Subcommittee stated:

> I would certainly concur with what the chairman [Rodino] said, that impeachment doesn't mean that you only try people who are guilty of violation of criminal laws; nor does it mean that you cannot be subjected to punishment under the criminal laws, even though impeachment does not occur.
>
> Id. at 138.

McClory, Robert, ranking minority member stated:

> For instance, if a circuit council received evidence that a crime had been committed, it would be inappropriate, it seems to me, to refer it to the Judiciary Committee for impeachment. Instead, it should be referred to a grand jury to determine whether or not the person should be indicted and tried. I believe that we want to avoid in legislation a requirement that all cases should be referred to the House Judiciary Committee for impeachment.
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> Id. at 141. (emphasis added).

5. Continued

Rosenberg, Maurice, Asst. Atty. Gen. Office for Improvements in the Admin. of Justice, stated:

> In terms, impeachment applies only if the offense is treason, bribery, high crimes, and other misdemeanors, but misconduct of that kind is, of course, a criminal offense and will be prosecuted criminally. Just a few days ago, on March 27, Chairman Rodino and the ranking minority member, Mr. McClory, testified that in the event criminal actions are brought against a Federal judge, as I understand it, the Judiciary Committee on the House side will stay its hand as far as impeachment proceedings are concerned until the criminal proceedings have run their course. If they eventuate in a conviction, then I don't expect that we will see in the future--we have not seen in the past--any judge remain on the bench after his conviction of an impeachable crime.
>
> That means if the sequence is criminal process first, then impeachment, we simply are not going to see impeachment used. The criminal process is so much broader than the impeachment process that impeachmnt is sort of a supplement to prosecution,

Claiborne's second line of argument finds its source in the salutary principles of separation of powers and judicial independence. Like the defendant in Hastings, he asserts that the judiciary would be subject to intolerable pressures from the executive branch if executive officers were permitted to prosecute

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5. Continued

> its purpose being to remove a judge convicted of a serious crime. Impeachment is not going to be often-used or effective if there is need for taking action against judges who have been guilty of reprehensible behavior that doesn't rise to the level of criminal prosecutability.

See also S. Rep. No. 362, 96th Cong. 1 Sess. 4 (1979), reprinted in 1980 U.S. Code & Ad. News 4315, 4318-19; H.R. Rep. No. 1313, 96th Cong., 2d Sess. 5 (1980).

Claiborne suggests the 1980 Act includes a determination by Congress that active federal judges may not be prosecuted by the Executive. In view of the foregoing legislative history and the language of the 1980 Act, we agree with Hastings that this claim is totally devoid of merit. See Hastings, 681 F.2d at 712 n.20.

active federal judges. He avers that immunity from criminal liability is a necessary complement to the specific safeguards of Article III -- most significantly, life tenure during good behavior. We disagree. Article III protections, though deserving utmost fidelity, should not be expanded to insulate federal judges from punishment for their criminal wrongdoing. See Isaacs, 493 F.2d at 1143. Hastings, 681 F.2d at 711. As the Supreme Court stated in United States v. Lee, 106 U.S. 196, 220 (1882):

> No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it.
>
> It is the only supreme power in our system of government, and every man who by accepting office participates in its functions is only the more strongly bound to submit to that supremacy, and to observe the

> limitations which it imposes upon the exercise of the authority which it gives.

The Supreme Court has applied Lee's rationale in rejecting Congressmen's claims that they were immunized from criminal prosecution prior to expulsion. See Burton v. United States, 202 U.S. 344, 368 (1906); United States v. Brewster, 408 U.S. 501, 516-20 (1972). In Brewster, for example, a Senator charged with having taken a bribe (18 U.S.C. § 201) claimed that the Speech or Debate clause precluded criminal prosecution. The Court rejected this claim stating:

> Admittedly, the Speech or Debate Clause must be read broadly to effectuate its purpose of protecting the independence of the Legislative Branch, but no more than the statutes we apply, was its purpose to make members of Congress super-citizens, immune from criiminal responsibility.
>
> . . .

> The sweeping claims of appellee would render members of Congress virtually immune from a wide range of crimes simply because the acts were peripherally related to their holding office.
>
> . . .
>
> Depriving the Executive of the power to investigate and prosecute . . . bribery is unlikely to enhance legislative independence.

Id. at 516, 520, 525.

We similarly think it unlikely that judicial independence would be measurably diminished by subjecting judges to the processes of criminal laws. First, aside from Article III safeguards, judges enjoy the same protection as ordinary citizens do from vindictive prosecution. Hastings, 681 F.2d at 711. Second, as Brewster emphasized, a criminal prosecution encounters several procedural barriers -- such as the indictment, burden of proof, and presumption of innocence. The Court in Isaacs, referring to these

and other procedural safeguards afforded a criminal defendant, concluded that the independence of the judiciary is better served when criminal charges against judges are tried in court rather than in Congress. Isaacs, 493 F.2d at 1144. Indeed, it is all too well known that the impeachment process is particularly cumbersome, time consuming, and susceptible to political whim and emotional reaction. Third, the possible abuse by the executive branch is minimized because "[t]he check and balance mechanism, buttressed by unfettered debate in an open society with a free press, has not encouraged abuses of power or tolerated them long when they arose." Brewster, 408 U.S. at 520. Finally, it is important to recognize that "criminal conduct is not part of the necessary functions performed by public officials. Punishment for that

conduct will not interfere with the legitimate operation of a branch of government." Isaacs, 493 F.2d at 1144. As perceptively noted in Brewster, 408 U.S. at 526: "Taking a bribe is, obviously, no part of the legislative process or function." This applies equally to the judicial branch.

In support of his claim that judicial independence will be substantially diminished without criminal immunity, Claiborne focuses on the practical consequences of an acquittal on criminal charges. He suggests that, if acquitted, his impartiality will be called into question every time he sits in a case in which the executive branch is a party. Purportedly, this will unduly diminish Claiborne's judicial authority and disrupt the judiciary's ability to administer its own affairs.

Though this argument has some persuasive appeal it does not carry the day. First, we think Claiborne has overstated the ability of the executive branch to force the recusal of an acquitted federal judge on bias grounds. The Supreme Court has stated that the trial judge's bias is presumed only where the judge has a personal or financial stake in the outcome or has been the target of personal abuse or criticism. See Withrow v. Larkin, 421 U.S. 35, 47 (1975); Taylor v. Hayes, 418 U.S. 488, 501-03 (1974); see also S. Rep. No. 419, 93d Cong. 1st Sess. 5 (1973). (the "appearance of impartiality" test of 28 U.S.C. § 455(a) was not intended to "warrant the transformation of a litigant's fear that a judge may decide a question against him into a 'reasonable fear' that the judge will not be impartial.") The second and more compelling

reason we reject Claiborne's claim is that the proposed solution to the problem is much worse than the problem itself. As Hastings states, "the minuscule incremental judicial independence that might be derived from [a rule granting sitting federal judges immunity from criminal prosecution] would be outweighed by the tremendous harm that the rule would cause to another treasured value of our constitutional system: no man in this country is so high that he is above the law." 681 F.2d at 711. It can scarcely be doubted that the citizenry would justifiably lose respect for and confidence in a system of government under which judges were apparently held to be above the processes of the criminal law.[6]

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6. In urging Hastings and Isaacs were wrongly decided, Claiborne relies heavily on Northern Pipeline Construction Co. v. Marathon Pipeline Co., 458 U.S. 50 (1982)

[Footnote continued]

6. [Continued]

and Nixon v. Fitzgerald, 457 U.S. 731 (1982). Both cases are inapposite and of no aid to Claiborne. Northern Pipeline, which invalidated the Bankruptcy Act of 1978 insofar as it conferred Article III powers on non Article III judges, simply emphasized the importance of providihg Article III judges with the appropriate protections of salary stability and life tenure. Nixon v. Fitzgerald, giving the President absolute immunity from civil damages for his official acts, merely cites cases recognizing that judges are absolutely immune from civil liability for acts committed in their official capacity. The "public interest" justification for granting immunity in civil suits against judges would not similarly apply to criminal actions. See O'Shea v. Littleton, 414 U.S. 488, 503 (1974), where the court states:

> [W]e have never held that the performance of the duties of judicial, legislative, or executive officers, requires or contemplates the immunization of otherwise criminal deprivations of Constitutional rights. Cf. Ex parte Virginia, 100 U.S. 339 (1880). On the contrary, the judicially fashioned doctrine of official immunity does not reach "so as to immunize criminal conduct proscribed by an Act of Congress. . . ." Gravel v. United States, 408 U.S. 606, 627 (1972).

[Footnote Continued]

III. Non-appealable Claim

Claiborne's second claim on this appeal is that the government's investigation and prosecution was motivated by a desire to retaliate against him for the manner in which he had exercised the functions of his office. He claims that the constitutional principal of an independent federal judiciary requires that the district court hold pre-trial evidentiary hearings to determine whether the executive's prosecution was improperly motivated.

Claiborne raises what is essentially a vindictive or selective prosecution claim, which is not immediately appealable under "the collateral order" exception. United States v. Hollywood Motor Car Co.,

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5. Continued

Cf. Dennis v. Sparks, 449 U.S. 24, 28 n.5 (1980) (state judge who is immune from civil liability is not immune from criminal liability).

458 U.S. 263, 277 (1982). Under the logic of Hollywood Motor, such a claim fails to meet Cohen's requirement of being "effectively unreviewable on appeal from final judgment." To afford Claiborne the interlocutory relief he seeks in the name of judicial independence would have the effect of giving him more protection that ordinary citizens raising similar claims enjoy. See Hastings, 681 F.2d at 711.

IV. District Courts Jurisdiction to Proceed

Having determined that Claiborne's first claim, though appealable, lacks merit, we must determine whether the district court ever lost jurisdiction to proceed. Specifically, we must decide whether the district court had jurisdiction to hear the pre-trial motions of February 21, 1984.

Ordinarily, if a defendant's interlocutory claim is considered immediately appealable under Abney, the district court loses its power to proceed from the time the defendant files its notice of appeal until the appeal is resolved. United States v. Yellow Freight System, Inc., 637 F.2d 1248, 1252 (9th Cir. 1980), citing Moroyoqui v. United States, 570 F.2d 862, 864 (9th Cir. 1977), cert. denied, 435 U.S. 997 (1978); United States v. Garner, 663 F.2d 834, 837-38 (9th Cir. 1981); United States v. Burt, 619 F.2d 831, 838 (9th Cir. 1980). See Griggs v. Provident Consumer Discount Co., ___ U.S. ___, 103 S.Ct. 400, 74 L.Ed.2d 225 (1982). This divestiture of jurisdiction rule is not based upon statutory provisions or the rules of civil or criminal procedure. Instead, it is a judge made rule originally devised in the context of civil

appeals to avoid confusion or waste of time resulting from having the same issues before two courts at the same time. United States v. Leppo, 634 F.2d 101, 104 (3rd Cir. 1980); United States v. Hitchmon, 602 F.2d 689, 691-92 (5th Cir. 1979) (en banc). Given this purpose, it has been suggested that "the rule should not be employed to defeat its purpose or to induce needless paper shuffling." 9 J. Moore, Federal Practice, ¶ 203.11 at 3-44 n.1 (1980); see also C. Wright, A. Miller, E. Cooper & E. Gressman, Federal Practice and Procedure, § 3949, at 358-59 (1977).

The divestiture rule takes on added significance when aplied to interlocutory Abney-type criminal appeals since two important countervailing policies are at work. On the one hand, a defendant raising a meritorious Abney-type claim -- asserting a valid, constitutional "right

not to be tried" -- would be irreparably harmed if the trial court continued to proceed to trial prior to the disposition of the appeal. On the other hand, under an automatic divestiture rule, a defendant raising a meritless Abney-type claim could significantly delay and disrupt criminal trial court proceedings. Burt, 619 F.2d at 838. See also Abney, 431 U.S. at 656-57 ("the delays and disruptions attendant upon intermediate appeal . . . are especially inimical to the effective and fair administration of the criminal law"). The Court in Abney, mindful of the need to balance these two interests, directed appellate courts to exercise their supervisory powers to establish summary procedures for quickly disposing of frivolous, dilatory pre-trial appeals.

The Fifth Circuit in United States v. Dunbar, 611 F.2d 985, 987-89 (5th Cir.),

cert. denied, 447 U.S. 9266 (1980) (en banc; twenty five judges) followed Abney's directive and adopted the "dual jurisdiction" rule that "appeal from the denial of a frivolous [Abney-type] motion does not divest the district court of jurisdiction to proceed with trial, if the district court has found the motion to be frivolous." This approach has been uniformly followed by other circuits. United States v. Leppo, 634 F.2d 101, 104 (3rd Cir. 1980); United States v. Head, 697 F.2d 1200, 1204 n.4 (4th Cir. 1982); United States v. Lanci, 669 F.2d 391, 394 (6th Cir. 1982); United States v. Cannon, 715 F.2d 1228 (7th Cir. 1982); United States v. Grabinski, 674 F.2d 677, 679 (8th Cir. 1982) (en banc).

The Ninth Circuit[7] implicitly adopted Dunbar's dual jurisdiction

7. Sitting as special panel for the Ninth Circuit, we are bound by applicable Ninth Circuit case law.

approach in United States v. Spilotro, 680 F.2d 612, 615 (9th Cir. 1982) and in United States v. Crozier, 674 F.2d 1293, 1297 (9th Cir. 1982). Both Spilotro and Crozier held that the interlocutory review of a collateral order restraining the sale or transfer of defendant's property did not divest the district court of jurisdiction to proceed. The Ninth Circuit, however, has yet to adopt Dunbar in the context of an Abney-type claim involving a "right not to be tried". This reluctance is due to the Ninth Circuit's concern that a defendant who has raised a meritorious Abney-type claim would be irreparably harmed if the trial court were allowed to proceed to trial prior to the appellate court's disposition of the claim. Burt, 619 F.2d at 838. This concern is not as vitally involved when only pre-trial hearings proceed in the district court rather than the trial

itself. Because this court has now determined that Claiborne's asserted "right not to be tried" claim lacks merit, the trial court's continuation of pre-trial hearings was harmless. Requiring the district court to rehear and rule again on the same matters would achieve nothing other than to significantly disrupt and delay an ongoing criminal trial, a result running afoul of the purpose behind the divestiture rule and the court's dictum in Abney. As the court stated in Leppo, 634 F.2d at 104, "[a] ritualistic application of the divestiture rule in the Abney context conflicts with the public policy favoring rapid adjudication of criminal prosecutions."

The district court scrupulously followed the procedures set forth in Dunbar by finding, as a predicate to its assertion of retained jurisdiction, that Claiborne's separation of powers claim was

frivolous. Though we now disagree with that characterization of Claiborne's claim, no useful purpose would be served by requiring that court to redecide the pre-trial motions on February 21, 1984. Under the circumstances, therefore, it was harmless for the district court to proceed to hear the motions of February 21, 1984. See Hastings, 681 F.2d at 709, n.4. (Court, while characterizing defendant's separation of powers claim as "nonfrivolous", nevertheless recognized that under Dunbar "the trial court could have determined that the issues raised . . . were frivolous and then proceeded to trial without awaiting the determination of the court of appeals").

However, in view of the jurisdictional problems to which we have referred, we suggest that the district court reenter on the record the motions, findings, and other matters contained in the hearing

transcript of February 21, 1984, without the need for reargument or retaking testimony.

We therefore affirm the district court's order denying Claiborne's motion to quash the indictment; we deny the petitions for writs of mandamus and prohibition, and deny as moot the renewed motion for a stay. Let the mandate issue forthwith.

FILED
December 10, 1985
Cathy A. Catterson
Clerk
U.S. Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. HARRY E. CLAIBORNE, Defendant-Appellant.	)	No. 84-1294 DC# CR 83-57 WEH ORDER

Before: LUMBARD, PELL, and McWilliams*, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing and to recommend rejection of the suggestion for rehearing en banc.

The full court was advised of the suggestion for an en banc hearing. A vote was requested and taken, and failed to receive a majority of the votes of the

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* Circuit Judges of the Second, Seventh and Tenth Circuits, sitting by designation.

non-recused judges. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

Filed
December 30, 1985
Cathy A. Catterson
Clerk
U.S. Court of Appeals

United States v. Claiborne, No. 84-1294

FERGUSON, Circuit Judge, dissenting from the order denying hearing en banc.

The refusal of the court to rehear this case en banc is lamentable. When the prosecution withholds vital exculpatory information, justice is denied. Rehearing en banc is necessary to correct the substantial curtailment of a defendant's right to discover impeachment material pursuant to the Jencks Act, 18 U.S.C. § 3500, and Brady v. Maryland, 373 U.S. 83 (1963).

Defense access to exculpatory or empeachment evidence within the government's possession is a vital constitutional and statutory right. See Brady, 373 U.S. at 87; United States v. Polizzi,

500 F.2d 856, 893 (9th Cir. 1974) ("The prosecution is obligated to disclose to the defense statements falling within the Jencks Act regardless of anyone's perception of the utility of the statements for impeachment."), cert. denied, 419 U.S. 1120 (1975). Impeachment evidence plays a pivotal role in any trial, see, e.g., Davis v. Alaska, 415 U.S. 308, 316 (1974), and withholding impeachment evidence in this case denied the defendant an effective defense.

Claiborne, a United States district court judge, was convicted of income tax evasion. His accountant, Wright, was an important prosecution witness. At trial, Claiborne presented evidence that his secretary delivered a letter to Wright revising the amount of his income. Wright testified that he had no recollection of receiving the letter and further that he

never lost client files. Thus, Claiborne's conviction hinged on Wright's credibility. Regrettably, the government and the trial judge failed to furnish Claiborne during the trial with damaging pretrial statements made by Wright.

Government agents' summaries of pretrial interviews with Wright indicate that he admitted to them that a substantial number of his client's files had been "thrown away." Despite a standing request under the Jencks Act and Brady for witnesses' pretrial statements, the defense learned of the summaries only after trial. At a posttrial hearing, the trial judge disclosed the existence of the summaries of the Wright interviews.

Although the judge reviewed some of the in camera material during trial, he examined none of the Wright material at that time. At the posttrial hearing, he

reviewed some of the Wright material and concluded that none of it was Jencks Act or Brady impeachment material. Further, he failed to examine the remaining in camera material, some of which might have impeached Wright's testimony.

On appeal, the panel admitted that the Wright summaries were Brady impeachment evidence, but erroneously concluded that the failure to disclose the material was not prejudicial to the defense. United States v. Claiborne, 765 F.2d 784, 802-04 (9th Cir. 1985). The panel's Brady analysis ignored United States v. Bagley, 105 S.Ct. 3375 (1985), announced six days before Claiborne. Under Bagley,

> The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome.

Id. at 3384. The panel should have decided whether suppression of the Wright interview material "undermined confidence in the outcome of the trial." Instead, the panel employed a two part test: whether the evidence would have "created a reasonable doubt" or whether it "might have affected the outcome" of the trial. Claiborne, 765 F.2d at 802-03.

Ample evidence from the record supports the conclusion that suppression of the material undermines confidence in the trial outcome. Wright was a keywitness in the government's case. Evidence that a significant number of his clients' files had been discarded, directly contradicting his earlier testimony, would certainly undermine his credibility sufficiently for the jury to conclude that the defendant had testified truthfully. Thus, Claiborne's conviction should have been

reversed because the government withheld Brady impeachment evidence of one of its key witnesses.

Similarly, the panel's Jencks Act analysis was incorrect. The panel denied Claiborne access to the Wright summaries because they were not transcribed "in a substantially verbatim fashion" and the government agents did not draft them contemporaneously with Wright's interview. Id. at 801. After Claiborne, the government need only produce 18 U.S.C. § 3500(e)(1) statements actually read or drafted by the witness, and 18 U.S.C. § 3500 (e)(2) statements drafted by an agent before the interview is over. This reasoning conflicts with Campbell v. United States, 373 U.S. 487 (1963), and significantly reduces a defendant's ability in this circuit to obtain witness statements taken by government agents.

Under Campbell, section 3500(e)(1) statements need not be signed or written by the witness, or even be a substantially verbatim recording of a prior statement. Id. at 492 n.6. The Court held that the FBI agent's recitation of the "substance" of his rough notes, which were "not a complete word-for-word transcription" of the interview, demonstrated sufficient adoption by the witness for purposes of the Jencks Act when the witness told the agent "he had got it straight." Id. at 489-90. The FBI agent wrote his report, based on rough notes and personal memory, seven hours after the witness interview. Id. at 490. The Court imposed no requirement or expectation that the agent draft a witness statement during an interview. Rather, Campbell recognized the informal and commonplace FBI practice of taking rough notes during an interview and later

transcribing them into statements. This practice in Campbell made the witness statements no less susceptible to disclosure under the Jencks Act.

The fundamental error the panel committed was its failure to conduct an independent examination of the materials on which the trial court based its rulings. I fail to see how the panel, without looking at that material, could have fairly decided whether those rulings were erroneous [sic]. A reviewing court has an obligation to examine Brady and Jencks Act material to ensure that the district court's rulings were correct. See Campbell, 373 U.S. at 493. After the district court judge opened the in camera material at the posttrial hearing, he resealed the withheld documents. The documents have not been unsealed or read by anyone since the district court's

posttrial hearing.

The en banc call in this case has been difficult for the judges of this circuit. It may be that hearing the case en banc and potentially reversing the conviction would be viewed by the public as defending one of our own rather than fairly applying the law. However, a defendant's right to a constitutionally fair trial cannot be balanced against the perception of others. Of course, we have an obligation to ensure that the circuit's actions are evenhanded and unbiased. But that duty is not jeopardized here. We must uphold our responsibility to remedy violations of constitutional rights, and I dissent from the court's refusal to hear this case en banc.

FILED
December 16, 1985
Cathy A. Catterson
Clerk
U.S. Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. HARRY E. CLAIBORNE, Defendant-Appellant.	)	No. 84-1294 DC# CR 83-57 WEH ORDER

Before: LUMBARD, PELL, and McWilliams*, Circuit Judges.

Appellant's motion for a stay of mandate is granted, in part. The mandate is stayed for thirty (30) days. If a petition for a writ of certiorari is filed within thirty days, this stay shall continue until the petition is finally disposed of. See Fed. R. App. P. 41(b).

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* Circuit Judges of the Second, Seventh and Tenth Circuits, sitting by designation.

Filed Dec. 8, 1983

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

UNITED STATES OF AMERICA, Plaintiff, v. HARRY EUGENE CLAIBORNE, Defendant.	) Criminal No. CR-R-83-57-WEH) INDICTMENT) [18 U.S.C. §§ 201, 7342, 503, 1001]) [26 U.S.C. § 7206(1)]

THE GRAND JURY CHARGES:

COUNT I

Between on or about December 14, 1978 and December 15, 1978, in the District of Nevada, the Defendant, HARRY EUGENE CLAIBORNE, being a public official, that is a United States District Court Judge for the District of Nevada, directly and indirectly, corruptly asked, demanded, exacted, solicited, sought, accepted, received and agreed to receive for himself a thing of value, that is United States currency in the amount of $30,000, from Joseph Conforte, in return for being

influenced in his performance of an official act, that is the decisions and rulings that he made and was to make and the timing of those rulings with regard to two consolidated motions to quash grand jury subpoenas then pending before him, said motions captioned, In the Matter of Application of Olga Irene Karaway For an Order to Show Cause, Misc. R-78-36, and In Re Grand Jury Subpoena Served on Sessina Lowe, Misc. R-78-35; in violation of Title 18, United States Code, Section 201(c).

COUNT II

1. From on or about March 8, 1979 and continuing to and including April 30, 1980 in the District of Nevada and elsewhere HARRY EUGENE CLAIBORNE, named herein as the defendant, devised and intended to devise a scheme and artifice to defraud and for obtaining money and property by

means of false and fraudulent pretenses, representations, and promises to Joseph Conforte, well knowing that the pretenses, representations and promises would be and were false and fraudulent when made, which scheme is more fully set forth below.

2. It was a part of the scheme to defraud that the defendant, HARRY E. CLAIBORNE, would falsely represent that he could corruptly secure the reversal of the criminal convictions of Joseph and Sally Conforte in the case of United States v. Joseph Conforte, et. al., (No. 77-3956 and No. 78-3310).

3. It was a further part of the scheme to defraud that the defendant, HARRY E. CLAIBORNE, would falsely represent that, in order to secure the reversal of the criminal convictions of Joseph and Sally Conforte, he would bribe one or more judges of the United States Court of Appeals for the Ninth Circuit.

4. It was a further part of the scheme to defraud that the defendant, HARRY E. CLAIBORNE, would represent that the said corrupt reversal of the criminal convictions of Joseph and Sally Conforte would be accomplished in consideration of $55,000 paid on or about March 8, 1979, and $45,000 that would be required to be paid to the defendant at a later date.

5. It was a further part of the scheme to defraud that the defendant, HARRY E. CLAIBORNE, would make certain false statements to Joseph Conforte and Stanley Brown, Sr., as agent for Joseph Conforte, to lull Joseph Conforte into believing that his conviction would be reversed and that the defendant was the person responsible for corruptly causing the reversal.

6. In furtherance of that portion of the scheme to defraud as described in

Paragraph No. 5 above, the defendant, HARRY E. CLAIBORNE, did, on several occasions, falsely advise Joseph Conforte and Stanley Brown, Sr. that the defendant had, on several occasions, spoken with the judges of the United States Court of Appeals for the Ninth Circuit and that those judges had advised the defendant that they would reverse the conviction of Joseph Conforte.

7. On or about June 3, 1979, in the District of Nevada, the defendant, HARRY E. CLAIBORNE, for the purposes of executing the aforesaid scheme and artifice to defraud and attempting to do so did cause to be transmitted in interstate commerce by means of a wire communication, that is, a telephone communication, between a location within the State of California and Reno in the State of Nevada, certain signs, signals and sounds, in violation of

Section 1343 of Title 18 United States Code.

COUNT III

Between on or about April 30, 1982 and July 1, 1982, in the District of Nevada, the Defendant, HARRY E. CLAIBORNE, willfully and knowingly, corruptly did endeavor to influence, obstruct and impede the due administration of justice in the United States District Court for the District of Oregon, in that the said, HARRY E. CLAIBORNE, knowing that one Stanley Brown, Sr., had received a subpoena requiring him to appear on May 11, 1982 and that he intended to reappear at an undetermined date following July 2, 1982, before the Grand Jury for the District of Oregon which was inquiring into possible violations of the federal bribery laws, urged, advised and persuaded Stanley Brown, Sr. to give false testimony

before said Grand Jury in relation to the aforesaid investigation; in violation of Title 18, United States Code, Section 1503.

COUNT IV

On or about October 15, 1979, in the Judicial District of Nevada, HARRY EUGENE CLAIBORNE, a resident of Las Vegas, Nevada, did willfully and knowingly make and subscribe a United States Individual Income Tax Return, Form 1040, for the calendar year 1978, which was verified by a written declaration that it was made under penalties of perjury and was filed with the Internal Revenue Service, which said income tax return he did not believe to be true and correct as to every material matter in that the said return reported total income (Line 21) in the amount of $92,340.44 whereas, as he then and there well knew and believed he

received substantial income in addition to that heretofore stated; in violation of Title 26, United States Code, Section 7206(1).

COUNT V

On or about June 15, 1980, in the Judicial District of Nevada, HARRY EUGENE CLAIBORNE, a resident of Las Vegas, Nevada, did willfully and knowingly make and subscribe a United States Individual Income Tax Return, Form 1040, for the calendar year 1979 which was verified by a written declaration that it was made under penalties of perjury and was filed with the Internal Revenue Service, which said income tax return he did not believe to be true and correct as to every material matter in that the said return reported total income (Line 22) in the amount of $80,227.04 whereas, as he then and there well knew and believed he received substantial income in addition to that

heretofore stated; in violation of Title 26, United States Code, Section 7206(1).

COUNT VI

On or about June 15, 1981, in the Judicial District of Nevada, HARRY EUGENE CLAIBORNE, a resident of Las Vegas, Nevada, did willfully and knowingly make and subscribe a United States Individual Income Tax Return, Form 1040, for the calendar year 1980 which was verified by a written declaration that it was made under penalties of perjury and was filed with the Internal Revenue Service, which said income tax return he did not believe to be true and correct as to every material matter in that the said return reported total income (Line 22) in the amount of $54,251.00 whereas, as he then and there well knew and believed he received substantial income in addition to that heretofore stated; in violation of Title 26, United States Code, Section 7206(1).

COUNT VII

1. At all times pertinent herein HARRY EUGENE CLAIBORNE, Defendant herein, was a Judge of the United States District Court for the District of Nevada.

2. At all times pertinent herein the Ethics in Government Act of 1978, Public Law 95-521, required, among other things, that every year each Judge of the United States District Courts submit a report disclosing items describing the nature and extent of financial holdings, liabilities and transactions including, among other things, loans owed by the Judge at any time during the portions of the previous calendar year that the individual was a Judge.

3. On or about June 20, 1979, in the District of Nevada, HARRY EUGENE CLAIBORNE, Defendant herein, did willfully and knowingly make and use and cause to be

made and used a false writing and document knowing it to contain a false, fictitious and fraudulent statement and entry as to a material fact in a matter within the jurisdiction of the Judicial Ethics Committee of the Judicial Conference of the United States ("Committee"), a department or agency of the United States in that in his financial disclosure report for the calendar year 1978, made pursuant to the Ethics in Government Act of 1978, Public Law 95-521, and submitted to the Committee, HARRY EUGENE CLAIBORNE misrepresented the extent and nature of his financial liabilities existent during the calendar year 1978, in that he excluded an outstanding personal loan of $76,000 made to him by a person or persons unknown to the grand jury whereas, in truth and fact, as HARRY EUGENE CLAIBORNE then knew, said loan was made, did exist, and was

outstanding at some time during the portion of the calendar year 1978 that the Defendant was a United States District Judge, in violation of Title 18, United States Code, Section 1001.

A TRUE BILL

_____
Foreman

_____
STEVEN A SHAW
Attorney
Public Integrity Section
Criminal Division
Department of Justice
Washington, D.C. 20530

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	CR-R-83-57-WEH
HARRY EUGENE CLAIBORNE, Defendant.	)	

MOTION TO QUASH INDICTMENT AND DISMISS PROCEEDINGS: VIOLATION OF JUDICIAL INDEPENDENCE AND SEPARATION OF POWERS

United States District Judge Harry Eugene Claiborne moves that this Court enter an order quashing the indictment and dismissing the proceedings against him on the grounds that:

a. The Constitution requires that impeachment and removal by the Legislative Branch precede the exercise of prosecutorial discretion by the Executive and the judicial power by the Judiciary to determine whether conduct in office by a United States judge in active service constitutes

high crimes or misdemeanors under the laws of the United States; and

b. The Executive's actions in investigating and using the grand jury to investigate Judge Claiborne's conduct in office have violated the Constitution and are inconsistent with the principles designed to keep separate the powers of government and the provisions adopted to guaranty the independence of the Judiciary by guaranteeing the independence of the individual federal judge.

In support of this Motion, Judge Claiborne states:

1. In 1978, President James Earl Carter nominated Harry Eugene Claiborne to be a United States District Judge on the United States District Court for the District of Nevada. The Executive Branch conducted a full investigation and the Senate of the United States held hearings

to satisfy themselves that the professional and personal experience and qualifications of Harry Eugene Claiborne qualified him for appointment to that post. With knowledge and information developed, the Senate exercised its constitutional function and gave its advice and consent to the appointment of Harry Eugene Claiborne as a United States Judge. In August, 1978, with that advice and consent and having fully satisfied himself that the appointment of Harry Eugene Claiborne was consistent with the policies of the then Executive, the President exercised his constitutional function and perogative and appointed Harry Eugene Claiborne a United States District Judge.

2. Judge Claiborne took the required oath and assumed judicial office on September 1, 1978. He has been a judge in

active service on this Court since that date, becoming its chief judge on May 1, 1980. He has been, is, and will remain entitled to hold and exercise the powers of that office free from coercion or undue interference by the Executive unless and until he is impeached by the House of Representatives for, and convicted by the Senate of, "Treason, Bribery, or other high Crimes and Misdemeanors" (U.S. Const., art. I, §§ 2 and 3; art. II, § 4; and art. III, §§ 1 and 2).

3. In exercising the powers and performing the duties of a United States district judge, Judge Claiborne has regularly had to decide cases and controversies to which the United States was a party and in which the interests of the United States were asserted by attorneys acting under the supervision and control of the Attorney General of the United

States. Since assuming the duties of his office, in the exercise of independent judicial discretion, Judge Clairborne has frequently found it necessary to render decisions adverse to positions vigorously asserted by attorneys for the United States, including attorneys responsible for exercising the Executive's investigatory powers and prosecutorial discretion and for prosecuting persons charged with violating the laws of the United States. These decisions have made Judge Claiborne unpopular with some of the attorneys who represent the United States and with other agents who act under the control and supervision of the Attorney General of the United States.

4. Since 1978 and continuing to the present, attorneys and other persons acting under the supervision and control of the Attorney General of the United

States have used the investigative and prosecutorial powers of the Executive and have invoked the criminal processes of the federal courts to develop facts upon which they might induce a federal grand jury to return an indictment against Judge Claiborne.

5. The Executive has been motivated in exercising these powers by an intent to retaliate against Judge Claiborne and to bring coercive pressure upon him for the manner in which he has exercised the judicial power in cases to which the Executive was a party and for other actions he has taken as a judge.

6. The actions of the Executive's attorneys in investigating Judge Claiborne during the past five years have disrupted the judiciary in the District of Nevada and the Ninth Circuit and have interfered with Judge Claiborne's right and ability

to exercise the functions of his office freely and properly. By its actions in obtaining and filing the indictment, the Executive (a) has forced Judge Claiborne to declare a mistrial in a major prosecution in which a jury had been impanelled and substantial evidence taken; (b) has compelled the reassignment of all cases pending before Judge Claiborne; (c) has required the designation of a judge from outside the circuit, disrupting the judicial business of the Eastern District of Virginia as well as that of the District of Nevada and interfered with the right and ability of the judges of this district to manage and control the judicial business of this district; and (d) has attempted to force this Court to adjudicate a claim by the Executive that a member of this Court has, by his conduct in office, committed high crimes and

misdemeanors under the laws of the United States.

7. There are more than 500 United States District Judges in active service. The proper exercise of the judicial function requires that each be free, and be seen by the people to be free, to exercise the judicial power in cases and controversies to which the United States is a party without fear of coercion or retaliation by attorneys for the United States who may be dissatisfied with a judge's exercise of the judicial function.

8. The existence and exercise of the powers the Executive has exercised here against Judge Claiborne is inconsistent with the guarantee that United States judges will have life tenure subject only to the powers of impeachment and removal vested in the Legislative Branch. The existence of these powers and their

exercise against Judge Claiborne cannot be reconciled with the doctrines developed to assure the powers of government would be kept separate and exercised by independent and coordinate branches of government.

9. The specific manner in which and the intent with which the Executive has exercised its powers and used the grand jury and other criminal processes of the courts to obtain an indictment against Judge Claiborne directly violates the purpose and function of the provisions granting him life tenure and assigning the sole power of impeachment to the House of Representatives.

Accordingly, for the reasons set forth above, for those developed in the accompanying Memorandum of Law, and in light of the facts to be shown upon an evidentiary hearing on the allegations set forth in this motion, United States

District Judge Harry Eugene Claiborne requests that this Court enter an order quashing the indictment and dismissing these proceedings and granting him such other and further relief as the Constitution and the nature of his office may require.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

UNITED STATES OF AMERICA, Plaintiff, vs. HARRY EUGENE CLAIBORNE, Defendant.	)	CR-R-83-57-WEH

SUPPLEMENTAL MEMORANDUM AND PROFFER IN SUPPORT OF REQUEST FOR FACTUAL PROCEEDINGS ON MOTION TO QUASH INDICTMENT AND DISMISS PROCEEDINGS: VIOLATION OF JUDICIAL INDEPENDENCE AND SEPARATION OF POWERS

United States District Judge Harry Eugene Claiborne files this Supplemental Memorandum and Proffer to assure that this Court is properly advised and that the record is clear with respect to his request, in the alternative, for factual proceedings in connection with his Motion to Quash Indictment and Dismiss Proceedings: Violation of Judicial Independence and Separation of Powers (the "Motion").

Preliminary Statement

By the Motion, Judge Claiborne made two claims. First, he asserted that the Constitution defined the correct sequence of remedies for allegations of malconduct in office against a federal judge: impeachment and removal by the Congress and then, but only then, executive prosecution and judicial trial. Second, and in the alternative, Judge Claiborne asserted that, if the constitutional prohibition against executive prosecution and judicial trial prior to legislative impeachment and removal was not absolute, then, and at a minimum, the Court must conduct factual proceedings to determine whether the specific manner in which and intent with which the government had initiated and conducted the investigation and obtained the indictment against him was inconsistent with the rights and

privileges guaranteed every federal judge as incidents to the judicial office.

At a hearing held on January 9, 1984, this Court orally stated that the Motion would be denied. At the same time, the Court indicated that it did not perceive the relevance and was concerned by the time being consumed by counsel's attempted oral proffer of facts relevant to the Motion's second claim. This Supplemental Memorandum and Proffer is submitted to assure that the basis upon which these facts are deemed relevant is clear and to submit an adequate proffer without consuming further time by oral proceedings.

Supplemental Memorandum

The Supreme Court has long recognized that there are certain constitutional claims that a defendant may assert in criminal proceedings that are collateral to the question of guilt or innocence and

so important that they must be resolved prior to any trial on the merits, e.g. Abney v. United States, 431 U.S. 651 (1977). Some of these claims require that the trial court conduct evidentiary proceedings to determine whether the claims asserted are valued, e.g. double jeopardy claims such as those asserted in Abney.

The Supreme Court has also recognized that claims by a public official that the Constitution prohibits specific proceedings against him raise collateral questions that may require factual proceedings and that must be resolved before the merits can be reached. Helstoski v. Meanor, 442 U.S. 500 (1979); Nixon v. Fitzgerald, 457 U.S. 731 (1982); see also United States v. Brewster, 408 U.S. 501 (1972).

By the Motion, Judge Claiborne asserts that at a minimum this Court must conduct factual proceedings to determine whether the Executive's decisions to investigate his conduct in office, its decisions and conduct with respect to the manner in which its investigations were conducted and the grand juries used, and its decision, its conduct in obtaining the indictment here evidence an intent to retaliate against him for the manner in which he has exercised the judicial function or a conspiracy among officials of the Executive to drive him from office or burden his ability to act as a judge in the future in matters in which the Executive has an interest.

These claims are based solely upon the rights and guarantees embodied in the Constitution to guarantee the independence of the Judiciary and to maintain the

proper separation of executive, legislative, and judicial function and powers. The constitutional bases upon which Judge Claiborne asserts these claims is wholly different from the bases upon which Harry Eugene Claiborne as an individual, asserts similar claims based upon his rights under the Fourth, Fifth, and Sixth Amendments to the Constitution. The facts underlying both types of claims however, are similar. That is why the factual allegations contained many of defendant's other pretrial motions are incorporated in the proffer.

The fact that the bases for the claims Judge Claiborne asserts in the Motion are incident to the judicial office creates two other significant distinctions from the claims he asserts as an individual. First, because these judicial office claims are collateral, both the discovery

and the evidentiary proceedings should be completed on the Motion before the Court proceeds to trial or hearings on the merits. For that reason, the proffer also identifies and incorporates discovery motions relevant to the claims asserted by the Motion. Second, the burden of proof and the burden of going forward should also be different for the claims asserted by the Motion than that established for individuals asserting comparable claims in pre-trial motions. The Supreme Court's reiteration that the Constitution "commands that the independence of the Judiciary be jealously guarded. . ." makes this clear. Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982).

In sum, if the Court had found that Judge Claiborne was entitled to evidenti-

ary proceedings on the Motion, Judge Claiborne would have:

1. Offered evidence to establish the factual allegations made in the Motion, in the supporting Memorandum, and in the other pre-trial motions incorporated in the proffer;

2. Offered evidence to prove the specific facts alleged in the proffer;

3. Asserted rights, in connection with proceedings on the Motion, to discover the information requested in the motions incorporated into the proffer, subject to such protective orders or agreements as may be necessary to protect the government's legitimate interests; and

4. With such discovery as the Court granted, offered evidence to prove or tending to prove the facts supporting the claims asserted in the Motion.

Proffer

Judge Claiborne proffers that, if the court permitted hearings upon the claims asserted in the Motions, the evidence would show or tend to support an inference that:

1. Prior to his appointment to judicial office, the FBI investigated him and submitted negative evaluation of his fitness and recommended he not be appointed. The Senate was aware of that report and recommendation at the time it exercised its constitutional prerogative and unanimously consented to the apointment of Harry Eugene Claiborne as a United States District Judge. President Carter and his advisors were aware of that report and recommendation at the time the President exercised his constitutional prerogative and appointed Harry Eugene Claiborne as United States Judge. Judge Claiborne

would prove these allegations, if the government denied them, by subpoenaing from the government, the report and recommendations and records and testimony showing that it has been communicated to the office of the President and to the appropriate committee of the Senate.

2. Notwithstanding the President's decision to reject the FBI's evaluation and recommendations and to appoint Judge Claiborne, subordinate officials of the FBI continued their investigation into Judge Claiborne's pre-judicial conduct after he had taken office. As part of that investigation, they used the processes of a federal grand jury in Las Vegas, Nevada, but were unable to obtain or present evidence sufficient to obtain an indictment. Judge Claiborne would support these allegations, if the government denied them: (a) by asking that this

Court examine the records of the grand juries sitting in Las Vegas, Nevada, during the period September 1, 1978 through December 31, 1980, for the purposes of establishing the existence and result of these investigation and (b) by subpoenaing Geoffery Anderson, former Chief of the United States Department of Justice Organized Strike Force in Las Vegas, Nevada; and Joseph Yablonsky, agent-in-charge, of the Nevada office of the FBI, as an adverse witness, to elicit testimony as to the investigative activities conducted under their supervision and with their knowledge during that period; (c) by subpoenaing the Honorable Roger Foley, senior United States District Judge and others to provide testimony and documents evidencing an open, notorious, and flagrant declared intent by Strike Force attorneys and FBI agents to use the

powers of their offices to drive Judge Claiborne and and other federal judges from office or to so impair his ability to function that he would not be able to preside in cases in which those agencies objected to his participation.

3. Between 1978 and the present, attorneys employed by the United States Department of Justice and agents of the Federal Bureau of Investigation have improperly threatened and attempted to intimidate individuals other than Judge Claiborne in order to induce such individuals to give testimony that would implicate Judge Claiborne in criminal or improper judicial activity. Specifically, Judge Claiborne incorporates the facts alleged in and incorporated into Defendant's Motion to Dismiss Indictment for Selective Prosecution and Multiform Governmental Misconduct and Abuse and For

Evidentiary Hearing (No. 26). In support of these allegations, if the government denied them, Judge Claiborne would subpoena and call the individuals named in that motion and its attachments and would subpoena and introduce the documents and reports described therein.

4. From April 8, 1980, to December 8, 1983, attorneys for the Strike Force and the Public Integrity Section, including Geoffery Anderson and Steven Shaw, with the support and assistance of federal agents, including Joseph Yablonsky, have continuously employed federal grand juries and other investigative techniques to obtain evidence and intimidate others to provide evidence that Judge Claiborne had engaged in improper conduct. Judge Claiborne incorporates as part of this Proffer the facts alleged in his Motion to Dismiss for Grand Jury Abuse; to Discover

Grand Jury Materials; to Interview Grand Juries; and for Evidentiary Hearing (the "Grand Jury Motion"; (No. 28). Judge Claiborne also incorporates as part of this proffer the facts alleged in his Motion to Disqualify Special Prosecutor (the "Shaw Motion") (No. 21). To support these allegations, if the government denied them, Judge Claiborne would call: Geoffrey Anderson, Joseph Yablonsky, Steven Shaw, the Honorable Roger Foley, Eddie LaRue, Ralph Lamb, John Moran, the Honorable Thomas O'Donnell, FBI Agent Patrick Murphy, former Las Vegas Police Detective Chuck Lee, Joseph Conforte, the Honorable Warren J. Ferguson, former District IRS Director Gerald Swanson, Peter Perry, Peter Lemberes, Alex Lemberes, Treasury Department Investigator Roderick Loss, James Brown, the Honorable Floyd Lamb, Leland Lutfy, the Honorable

Phillip Pro, Jerry Watson, Oscar B. Goodman, Lawrence Semenza, the Honorable Lamond Mills, and other persons named in the Grand Jury Motion and the Shaw Motion. Each would be called to testify with respect to facts that are identified as within his or her competence and that are set forth in detail in the Grand Jury Motion and the Shaw Motion. (Those who are presently employed as attorneys or agents for the Executive or who otherwise evidenced a reluctance to testify would be summoned as adverse witnesses.)

5. Judge Claiborne also incorporates specific allegations in this proffer the facts alleged in or incorporated into his pre-trial motions Nos. 2, 3, 10, and 25 (as numbered and identified in his Certificate of Service by Mailing and in the Appendix to Government's Response to Defendant's Pretrial Motions). In

addition to the witnesses previously named in this proffer, Judge Claiborne would call Stanley Brown as an adverse witness to testify with respect to his role in the representation of Joseph Conforte, the investigation of Judge Claiborne, and his conversations with agents and attorneys for the Justice Department and the FBI.

6. Judge Claiborne also incorporates the requests for discovery made in his pre-trial motions Nos. 1, 2, 3, 7, 8, 11, 15 (limited here to Joseph Conforte and such other witnesses who may be in the custody of, or being concealed by, the government), 16, 18, 19, 20, 27, and 30 and asserts them as discovery requests made in connection with the requests asserted in the Motion and upon the constitutional rights and privilege claimed in the Motion. As part of this

proffer; Judge Claiborne would expect to use the documents, testimony, and other evidence produced pursuant this Court's orders on these pre-trial motions to support the facts alleged in the Motion and in the facts set forth in this proffer.

Respectfully submitted,

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THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

UNITED STATES OF AMERICA,)
Plaintiff,)
)
vs.) CR-R-83-57-WEH
)
HARRY EUGENE CLAIBORNE,)
Defendant.)

ORDER

This court having considered the Motion to Quash Indictment and Dismiss Proceedings: Violation of Judicial Independence and Separation of Powers, the memoranda in support thereof and opposition thereto, and the Supplemental Memorandum and Proffer in Support of Requested Factual Proceedings;

IT IS HEREBY ORDERED, adjudged, and decreed that the Motion be and it hereby is DENIED.

Entered this 11th day of January, 1984.

Walter E. Hoffman
United States District Judge
Sitting by designation.

CONSTITUTIONAL AND STATUTORY PROVISIONS

CONSTITUTION OF THE UNITED STATES

ARTICLE I.

Section 1

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section 2, clause 5

The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

Section 3, clause 6

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Section 3, clause 7

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

ARTICLE II

Section 1, clause 1

The executive Power shall be vested in a President of the United States of America ....

Section 2, clause 1

The President shall * * * have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

Section 2, clause 2

... [H]e shall nominate, and by and with

the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law....

Section 3

...He shall take Care that the Laws be faithfully executed,....

Section 4

The President, Vice President and all Civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

ARTICLE III

Section 1

The Judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress

may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2, clause 1

The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; - to all Cases affecting Ambassadors, other public Ministers and Consuls; - to all Cases of admirality and maritime Jurisdiction; - to Controversies to which the United States shall be a Party; - to Controversies between two or more States; - between a State and Citizens of another State; -

between Citizens of different States; - between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Section 3, clause 3

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; ....

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indicitment of a Grand Jury, ...; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; ....

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to be informed

of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Title 18

§ 3500. Demands for production of statements and reports of witnesses.

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the

subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If,

pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for use in the trial.

(d) If the United States elects not to

comply with an order of the court under subsection (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means-

(1) a written statement made by said witness and signed or otherwise adopted or approved by him;

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral state-

ment made by said witness and recorded contemporaneously with the making of such oral statement; or

(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

Title 28

§ 455. Disqualification of justice, judge, or magistrate.

(a) Any justice, judge or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

* * *

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a

financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

* * *

Federal Rules Of Criminal Procedure

Rule 26.2. Production of Statements of Witnesses.

(a) Motion for Production. After a witness other than the defendant has testified on direct examination, the court, on motion of a party who did not call the witness, shall order the attorney for the government or the defendant and his attorney, as the case may be, to produce, for the examination and use of the moving party, any statement of the witness that is in their possession and that relates to the subject matter concerning which the witness has testified.

(b) Production of Entire Statement. If the entire contents of the statement relate to the subject matter concerning which the witness has testified, the court shall order that the statement be delivered to the moving party.

(c) Production of Excised Statement. If the other party claims that the statement contains matter that does not relate to the subject matter concerning which the witness has testified, the court shall order that it be delivered to the court in camera. Upon inspection, the court shall excise the portions of the statement that do not relate to the subject matter concerning which the witness has testified, and shall order that the statement, with such material excised, be delivered to the moving party. Any portion of the statement that is withheld from the defendant over his

objection shall be preserved by the attorney for the government, and, in the event of a conviction and an appeal by the defendant, shall be made available to the appellate court for the purpose of determining the correctness of the decision to excise the portion of the statement.

(d) Recess for Examination of Statement. Upon delivery of the statement to the moving party, the court, upon application of that party, may recess proceedings in the trial for the examination of such statement and for preparation for its use in the trial.

(e) Sanction for Failure to Produce Statement. If the other party elects not to comply with an order to deliver a statement to the moving party, the court shall order that the testimony of the witness be stricken from the record and that the trial proceed, or, if it is the

attorney for the government who elects not to comply, shall declare a mistrial if required by the interest of justice.

(f) Definition. As used in this rule, a "statement" of a witness means:

(1) A written statement made by the witness that is signed or otherwise adopted or approved by him;

(2) a substantially verbatim recital of an oral statement made by the witness that is recorded contemporaneously with the making of the oral statement and that is contained in a stenographic, mechanical, electrical, or other recording or a transcription thereof; or

(3) a statement, however taken or recorded, or a transcription thereof, made by the witness to a grand jury. (Added Apr. 30, 1979, eff. Dec. 1, 1980.)